TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted]91

POSTAL TELEGRAPH-CABLE COMPANY, PETITIONER,

vs.

WARREN-GODWIN LUMBER COMPANY.

[redacted]

(26,452)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 420.

POSTAL TELEGRAPH-CABLE COMPANY, PETITIONER,

vs.

WARREN-GODWIN LUMBER COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

	Page
Transcript of record from the circuit court of Hinds county	1
Caption	1
Proceedings before justice of the peace	2
Declaration	2
Judgment	4
Justice's certificate	4
Bond on appeal	5
Bill of exceptions	6
Agreed statement of facts	7
Exhibit A—Telegram, Warren-Godwin Lumber Co. to D. J. Peterson Lumber Co., December 23, 1915	9
B—Telegram, Peterson Lumber Co. to Warren-Godwin Lumber Co., December 23, 1915	9
C—Letter, Peterson Lumber Co. to Freight Agent M. & O. R. R., December 24, 1915, etc.	9
E—Letter, Peterson Lumber Co. to Freight Agent I. C. R. R., December 24, 1915, &c.	10
F—Letter, Peterson Lumber Co. to Warren-Godwin Lumber Co., December 23, 1915	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1918.

Page

G—Letter, Warren-Godwin Lumber Co. to Peterson Lumber Co., December 27, 1915..... 11
H—Telegram, Peterson Lumber Co. to Warren-Godwin Lumber Co., December 31, 1918.... 11
Testimony of B. C. Godwin..... 12
Judge's certificate to bill of exceptions..... 12
Petition for appeal..... 13
Bond on appeal..... 14
Clerk's certificate..... 15
Assignment of errors..... 16
Suggestion of diminution of record..... 17
Writ of certiorari..... 18
Judgment of circuit court..... 19
Exhibit B—Telegram, Peterson Lumber Co. to Warren-Godwin Lumber Co., December 23, 1918..... 20
A—Telegram, Warren-Godwin Lumber Co. to Peterson Lumber Co., December 23, 1915..... 20
Clerk's certificate, circuit court..... 21
Judgment 22
Opinion, Ethridge, J..... 23
Opinion, Stevens, J., specially concurring..... 24
Clerk's certificate..... 25
Writ of certiorari and return..... 26

No. 19,920

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi, begun and held at the Court Room at the Capitol in the City of Jackson, Mississippi, on the second Monday, being the 8th day of October A. D. 1917.

Present—The Honorable Sydney Smith, Chief Justice, the Honorable Sam C. Cook, the Honorable J. Morgan Stevens, the Honorable J. B. Holden, the Honorable E. O. Sykes and the Honorable George H. Ethridge, Associate Justices; Geo. C. Myers, Clerk and C. L. Johnson, Marshal.

The following proceedings were had in the case of

WARREN-GODWIN LUMBER COMPANY

Versus

POSTAL TELEGRAPH CABLE COMPANY

TOWIT:

No. 3,443

WARREN-GODWIN LUMBER COMPANY

v.

POSTAL-TELEGRAPH-CABLE COMPANY

INDEX.

Declaration 3
Judgment of the Justice of the Peace Court 5
Bond for Appeal to the Circuit Court 5
Agreed statement of Facts in Circuit Court 7
Copy of Original Telegram and Other Exhibits 9
Testimony of B. C. Godwin 11
Judgment of Circuit Court 16
Petition for Appeal 12
Contract on Back of Telegram 18
Judgment of Supreme Court of Mississippi 20
Opinion of the Supreme Court of Mississippi 21
Concurring Opinion of Justice Stevens 22
Certificate of Clerk of Supreme Court of Mississippi 22

Pleas and proceedings had and done at a Regular Term of the Circuit Court, in and for the First District of Hinds County, Mississippi, begun and held at the courthouse thereof in the city of Jackson, Mississippi, commencing on the 3d Monday of February, 1917, being the 19th day of February, 1917.

Present, Hon. W. H. Potter, Judge of the Seventh Judicial District of the State of Mississippi, and presiding judge of this court.

W. S. WELLS, Sheriff.

E. D. FONDREN, Circuit Clerk.

C. W. ROBINSON, Stenographer.

Be it remembered that there was filed in the office of the Circuit Clerk of Hinds County, Mississippi, on the 1st day of August, 1916, on appeal from the Justice of the Peace Court of T. B. Moore, a certain cause, which is in words and figures as follows, to-wit:

WARREN-GODWIN LUMBER COMPANY

v.

POSTAL-TELEGRAPH-CABLE COMPANY

In the Justice of the Peace Court, First Supervisor's District, Hinds County, Mississippi.
The Honorable T. B. Moore, Justice of the Peace.

DECLARATION

Comes Warren-Godwin Lumber Co., by its attorney, G. E. Williams, and in this its suit against Postal-Telegraph-Cable Company, for cause would show unto the court the following:

That Warren-Godwin Lumber Company, plaintiff herein, is a corporation, organized and existing under the laws of the State of Mississippi, with its domicile at Jackson, in the County of Hinds and State of Mississippi; and that the Postal-Telegraph-Cable Company, is a corporation organized and existing under the laws of the State of....., with an office and agent in the said City of Jackson, on whom process may be served.

That on the 23rd day of December, 1915, plaintiff gave to defendant's Jackson office the following message for delivery to D. J. Peterson Lumber Company:

D. J. Peterson Lumber Co.,
Toledo, Ohio.

Offer three transit cars eight inch two shiplap twenty-two dollars, answer quick.

Warren-Godwin Lumber Co.

That said defendant accepted said telegram for delivery but that in transmitting said telegram to said D. J. Peterson Lumber Company, defendant negligently left out the word *two* and delivered the message quoting the price of said three cars of lumber at twenty instead of twenty-two dollars per thousand, as shown by a copy of said telegram, attached hereto, marked "Exhibit A" and made part of this declaration, the same as if in words and Figures herein written.

That upon receipt of said telegram, said D. J. Peterson Lumber Company, by telegram, made the following reply:

Message received. Can book our order three transit cars eight inch two shiplap if good grade soda dipped or kiln dried and your price. Billing to our-

selves Derrick, Ill., care Clover Leaf. A copy of said telegram is attached hereto, marked "Exhibit B" and made part hereof the same as if in words and figures herein written.

That immediately upon receipt of said telegram from said Peterson, plaintiff ordered said cars of lumber shipped according to directions in said telegram. A copy shipping papers is attached hereto, marked "Exhibit C" and made part hereof.

That said mistake was not detected by plaintiff until after said three cars of lumber had been shipped and received by said consignee, and too late for said mistake to be corrected.

Plaintiff further shows that said three cars of lumber contained 62,640 feet of lumber, and that by reason of defendant's negligence in transmitting said telegram, as aforesaid, plaintiff has suffered damages in the sum of one hundred twenty-five dollars and twenty-eight cents, for which sum plaintiff now brings this suit, and demands judgment against the defendant, Postal-Telegraph-Cable Company in the sum of $125.28, together with cost of court.

G. E. WILLIAMS,
Attorney for Plaintiff.

Filed August 1, 1916.

E. D. FONDREN, Clerk.
J. P. CADWALLADER, D. C.

JUDGMENT IN JUSTICE COURT

Copy of the record of the proceedings before Tom Moore, a Justice of the Peace of Hinds County, in District No. One of said county, in the case therein set forth to-wit:

WARREN-GODWIN LUMBER COMPANY

v.

POSTAL-TELEGRAPH-CABLE COMPANY

JUDGMENT

This cause coming on this day to be heard by agreement of parties, the plaintiff and defendant appearing by counsel, and the court having heard the evidence and the argument of counsel is of the opinion that the plaintiff should recover.

It is thereby ordered and adjudged that the Plaintiff, Warren-Godwin Lumber Company, a corporation, do have and recover from the Postal-Telegraph-Cable Company, a corporation, the sum of One Hundred and Twenty-Five Dollars and Twenty-Eight Cents, with interest at the rate of six per cent per annum from the date hereof, and all costs in this behalf expended, for which let execution issue.

Ordered and adjudged this the 18th day of July, 1916.

T. B. MOORE,
Justice of the Peace.

STATE OF MISSISSIPPI,
County of Hinds.

I, T. B. Moore, a Justice of the Peace of said county, do certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

Given under my hand, this the 18th day of July, A. D., 1916.

T. B. MOORE, J. P.

Filed Aug. 1, 1916.

E. D. FONDREN, Clerk.
J. P. CADWALLADER, D. C.

APPEAL BOND TO CIRCUIT COURT

Know all men by these presents, That we, Postal-Telegraph-Cable Company, a corporation, principal, and J. N. Flowers and Ellis B. Cooper, Sureties, are held and firmly bound unto Warren-Godwin Lumber Company in the sum of $251.00, for the payment of which we hereby bind ourselves, heirs, assigns and legal representatives.

The condition of the foregoing obligation is that whereas, on the 18th day of July, 1916, in the Justice Court of Tom Moore, a Justice of the Peace in and for the County of Hinds and State of Mississippi, judgment was rendered against the Postal-Telegraph-Cable Company in favor of Warren-Godwin Lumber Company in and for the sum of $125.28; and the Postal-Telegraph-Cable Company feeling aggrieved thereat hath prayed an appeal to the Circuit Court of Hinds County, First Judicial District, and the same has been allowed.

Now therefore if the Postal Telegraph-Cable Company shall pay and satisfy such judgment as shall be rendered against it by the said Circuit Court this obligation shall be void; otherwise in full force and effect.

POSTAL TELEGRAPH-CABLE COMPANY,

By ELLIS B. COOPER, Atty. Principal.

J. N. FLOWERS,

ELLIS B. COOPER,

Sureties.

Approved this 18th day of July, A. D., 1916.

T. B. MOORE, J. P.

Filed August 1st, 1916.

E. D. FONDREN, Clerk.

J. P. CADWALLADER, D. C.

IN THE CIRCUIT COURT OF THE FIRST DISTRICT OF HINDS COUNTY, MISSISSIPPI.

WARREN-GODWIN LUMBER COMPANY,

v.

POSTAL TELEGRAPH-CABLE COMPANY

BILL OF EXCEPTIONS

Be it remembered that heretofore to-wit, on the .....day of October, 1916, the same being a regular day of the September Term of the Circuit Court in and for the First District of Hinds County, Mississippi, the above styled cause was called and came on for trial before the Hon. W. C. Wells, an attorney of said County, by agreement of the parties, a jury being waived and the cause submitted to the Court for decision, and after the pleadings had been read the following testimony was offered on behalf of the plaintiff:

AGREED STATEMENT OF FACTS

It is agreed by and between Chalmers Potter and G. Edw. Williams, attorneys for the Plaintiff, and Flowers, Brown, Chambers & Cooper, Attorneys for the Defendant, that the following facts correctly show the cause of action of the plaintiff and the defenses of the defendant and that at the trial hereof it shall be used as showing all of the facts pertinent to the case of both the plaintiff and the defendant.

It is agreed that on the 23rd day of December, 1915, the plaintiff offered to D. J. Peterson Lumber Company, at Toledo, Ohio, by telegram, which telegram was delivered to the defendant on the same date, three car loads of lumber, which telegram was in words as follows:

"Jackson, Miss., December 23, 1915.
D. J. Peterson Lumber Company,
Toledo, Ohio.

Offer three transit cars eight inch two shiplap twenty-two dollars answer quick.

WARREN-GODWIN LUMBER COMPANY."

It is agreed that the attached telegram, marked Exhibit "A" hereto, is the original telegram as delivered to the defendant at its Jackson office for transmission to the addressee at Toledo, Ohio.

It is agreed that the defendant in the transmission of the message made an error and when delivered to the addressee the telegram read as follows:

"Jackson, Miss., December 23, 1915.
D. J. Peterson Lumber Company,
Toledo, Ohio.

Offer three transit cars eight inch two shiplap twenty dollars answer quick.

WARREN-GODWIN LUMBER COMPANY."

It is agreed that D. J. Peterson in reply sent the plaintiff its acceptance being by wire, a copy of which is attached hereto and marked exhibit "B."

It is agreed that the plaintiff on receipt of the message marked exhibit "B" ordered out the cars as is shown by letters attached hereto and marked exhibits "C", "D," and "E."

It is agreed that on December 27, 1915, the plaintiff received the letters attached hereto and marked exhibit "F" and that plaintiff's reply thereto is shown by letter attached hereto and marked exhibit "G".

It is agreed that on December 24, 1915, one car of lumber was shipped to D. J. Peterson Lumber Company which car contained 23,070 feet.

It is agreed that the other two cars containing 39,570 feet were shipped on December 27, 1915.

It is agreed that on December 31, 1915, D. J. Peterson Lumber Company wired the plaintiff as is shown by the telegram attached hereto and marked exhibit "H."

It is agreed that the defendant has tendered to the plaintiff the amount paid by the plaintiff for the transmission of the message attached hereto as exhibit "A" and that the plaintiff has refused to accept the same.

It is agreed that the total freight of the three cars from their point of origin to the point of destination was $388.09.

It is agreed that either party may introduce evidence as to any other fact deemed to be pertinent.

CHALMERS POTTER,
FLOWERS, BROWN, CHAMBERS & COOPER.

Filed Sept. 20th, 1916.
E. D. FONDREN, Clerk.

EXHIBIT "A"

Jackson, Miss., December 23, 1915

D. J. Peterson Lumber Co.,
Toledo, Ohio.

Offer three transit cars eight inch two shiplap twenty two dollars, answer quick.

WARREN-GODWIN LUMBER COMPANY.

EXHIBIT "B"

5 H. M. 32 Blue.
Toledo, Ohio, 15, 9 P. M., Dec. 23.

Warren-Godwin Lbr. Co.,
Jackson, Miss.

Message Received. Can book our order three transit cars eight inch two shiplap if good grade soda dipped or kiln dried and your price. Billing to ourselves Derrick, Ill., care Clover Leaf.

D. J. PETERSON LBR. CO.
3 P. M.

EXHIBIT "C"

December 24, 1915.

Freight Agent, M. & O. R. R.,
Jackson, Tenn.

Dear Sir:

Enclosed find bill of lading for car M. K. & T. No. 17,334 loaded with yellow pine lumber, consigned to us at Jackson, Tenn.

You will please reconsign this car as follows:

D. J. PETERSON LUMBER CO.,
Herrick, Ills.,
Care of Clover Leaf.

Kindly forward same on the through rate of freight furnishing us with new bill of lading on same promptly, and oblige, Yours very truly,

WARREN-GODWIN LUMBER CO.

JRS--SS.

EXHIBIT "E"

December 24, 1915.

Freight Agent, I. C. R. R.,
Memphis, Tenn.

Dear Sir:

Enclosed find bill of lading for Mo. P. Car No. 31,235 loaded with yellow pine lumber, consigned to us at Memphis, Tenn.

You will please reconsign this car as follows:

D. J. PETERSON LUMBER CO.,
Herrick, Ill.
Care of Clover Leaf.

Kindly forward same on the through rate of freight, furnishing us with a new bill of lading on same promptly, and oblige. Yours very truly,

JRS--SS. WARREN-GODWIN LUMBER CO.

EXHIBIT "F"

Toledo, O., Dec. 23, 1915.

Warren-Godwin Lbr. Co.,
Jackson, Miss.

Gentlemen:

We have your telegram of even date offering three transit cars of 8 inch No. 2 Shiplap at $20.00 delivered Toledo, and have just wired you to book our order for these three cars, and herewith inclose formal shipping instructions.

Please arrange to favor us with invoices, together with original bills of lading promptly, and oblige,

Very truly yours,

M. H. THE D. J. PETERSON LBR. CO.

EXHIBIT "G"

December 27, 1915.

D. J. Peterson Lumber Co.,
Toledo, Ohio.

Gentlemen:

We are in receipt of your letter of the 23rd inst., with order No. 1587, for the three transit cars of 8

inch No. 2 Common shiplap, which we had, and note that you have the price $20.00, whereas it should be $22.00, which is in accordance with our telegram, *and also a previous order.*

We have invoiced the stock to you at $22.00, and forwarded the cars to you on the basis, and presume it is merely an error in making the price $20.00 on your order instead of $22.00.

Yours very truly,

JRS-SS. WARREN-GODWIN LUMBER CO.

EXHIBIT "H"

6 H. M. 61 Blue.

Toledo, O., 10:28 A. M., Dec. 31.

Warren-Godwin Lbr. Co.,

Jackson, Miss.

Your letter 27th was directed to Detroit and just received this morning. Your telegram of the twenty-third offered three transit cars two shiplap at twenty dollars and we hold accordingly. If error lies with telegraph company they are responsible and you can collect from them. We are going to settle on the quotation made us which is twenty dollars.

THE D. J. PETERSON LBR. CO.

B. C. Godwin, being called as a witness for the plaintiff, testified as follows:

That he is manager of the Warren-Godwin Lumber Company. That after he received confirmation of sale at the price, erroneously named in the telegram he went to see T. B. Scott, manager of defendant at Jackson, Mississippi, and told him of the mistake made by defendant and plaintiff's damages, and that defendant's said manager then told witness, who was acting for plaintiff, to file his claim, that the defendant would investigate and no doubt would pay the plaintiff's loss. That the market price of lumber of the quality involved in this suit at Herrick, Illinois, at the time of the sale was twenty-two dollars a thousand feet and that the loss of plaintiff was $125.50.

Whereupon plaintiff rests.

Defendant rests.

This was all the evidence in the case.

That thereafter the court rendered a judgment for the defendant as shown by the record. To which action of the court in rendering judgment against it and in favor of defendant the plaintiff then and there excepted, and prays that this plaintiff's bill of exceptions may be signed by the court, filed and made a part of the record in said cause, all of which is accordingly done this the 1st day of December, 1916.

W. C. WELLS, Special Judge.
W. H. POTTER, Judge.

Filed Dec. 1st, 1916.

E. D. FONDREN, Clerk.
D. C. CADWALLADER, D. C.

PETITION FOR APPEAL

To Hon. E. D. Fondren, Circuit Clerk:

Your petitioner, the undesigned Warren-Godwin Lumber Co., respectfully states that, at the September term of said court, on the 30th day of October, 1916, a judgment was rendered against them in favor of the Postal Telegraph & Cable Co. Feeling aggrieved at the judgment, he prays an appeal to the Supreme Court of the State of Mississippi and tenders herewith a good and valid bond, with sufficient sureties, in the penalty of Five Hundred Dollars for the payment of all costs, and the sum of ..... to prepay cost of transcript, as required by law, and asks that an appeal be granted.

WARREN-GODWIN LBR. CO.,
Plaintiff.
By CHALMERS POTTER,
Attorney.

Filed April 11th, 1917.

E. D. FONDREN, Clerk.
J. P. CADWALLADER, D. C.

Warren-Godwin Lumber Company
v.
Postal Telegram & Cable Company.

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

IN THE CIRCUIT COURT OF HINDS COUNTY.

Know All Men by These Presents,

That we, Warren-Godwin Lumber Co., principal, and B. C. Godwin and J. R. Sandefer, Sureties, freeholders in the State, are held and firmly bound unto the Postal Telegram and Cable Company, in the penal sum of five hundred dollars ($500.00), for which payment well and truly to be made, we, jointly and severally bind ourselves, our heirs, executors, administrators, forever.

The condition of the foregoing bond is such, that whereas, in the Circuit Court of Hinds County a judgment was rendered against Warren-Godwin Lumber Company, and in favor of the Postal Telegram & Cable Company, at the September Term of the said Court, on the————day of October, 1916, and the said Warren-Godwin Company, feeling aggrieved by the said judgment, has prayed and obtained an appeal to the Supreme Court. Now, if the said Warren-Godwin Lumber Company shall prosecute said appeal, with effect and shall pay all cost, if the same be affirmed, then this obligation to be void; otherwise to remain in full force and effect.

Given under our hand, this 9th day of April, 1917.

WARREN-GODWIN LUMBER CO.,
Principal.

B. C. GODWIN,
J. R. SANDEFER,
Sureties.

Approved, April 11, 1917.

E. D. FONDREN, Clerk.
J. P. CADWALLADER, D. C.

CLERK'S CERTIFICATE.

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

I, E. D. Fondren, Clerk of the Circuit Court, in and for the County of Hinds, in said State, do hereby certify that the foregoing 14 pages contain a true and correct transcript of the record in Cause No. 3443, *Warren-Godwin Lumber Company v. The Postal-Telegraph-Cable Company*, as the same appears of record and on file in my office at Jackson, Mississippi.

Given under my hand and Official Seal, this the 13th day of April, 1917.

E. D. FONDREN, Clerk
J. P. CADWALLADER, D. C.

IN THE SUPREME COURT OF MISSISSIPPI,

OCTOBER TERM, 1917.

Warren-Godwin Lumber Company, Appellant,
v.
Postal Telegraph-Cable Company, Appellee.

ASSIGNMENT OF ERRORS.

Comes Warren-Godwin Lumber Company, Appellant, and says that there is manifest error in the record and proceedings in the above styled cause, in this, to-wit:

That the Court erred in rendering a judgment against the plaintiff and in favor of the defendant.

Respectfully submitted,
G. E. WILLIAMS,
Attorney for Appellant.

I do certify that I have this day mailed to Messrs. Flowers, Brown, Chambers & Cooper, attorneys of record for Appellee, to their address in Jackson, Mississippi, a true copy of the foregoing assignment of errors.

This, the 13th day of November, A. D., 1917.

G. E. WILLIAMS.

IN THE SUPREME COURT OF MISSISSIPPI,

OCTOBER TERM, 1917.

No. 19,920.

Warren-Godwin Lumber Company,

v.

Postal Telegraph-Cable Company.

SUGGESTION OF DIMINUTION OF RECORD.

Now comes the Appellee, Postal Telegraph-Cable Company, by its attorneys, and shows to the Court that the record in the above-styled case is incomplete, the missing parts of same being as follows: (1) Judgment of the Lower Court—(2) Exhibit "A" to the agreed statement of facts, said Exhibit being the original telegram containing the stipulations of the contract entered into by appellee and appellant for the transmission of a certain message, which message is copied already into the record.

Appellee shows that the missing parts of the record are essential to its case in this Court, and moves that a writ of *certiorari* issue from this court to the Circuit Clerk of Hinds County directing that said missing parts of said record be certified to this Court.

Respectfully submitted,

J. N. FLOWERS,
Attorney for Appellee.

I hereby certify that I have mailed a copy of the foregoing suggestion and motion to Hon. G. E. Williams, Attorney for Appellant, in accordance with the rules of this Court.

This 27th day of November, 1917.

J. N. FLOWERS,
Attorney for Appellee.

Filed, November 28, 1917.
GEO. C. MYERS, CLERK.
W. J. BROWN, D. C.

THE STATE OF MISSISSIPPI.

To the Clerk of the Circuit Court of Hinds County, First District—Greeting:

Whereas, in the case of Warren-Godwin Lumber Company vs. Postal Telegraph-Cable Company, No. 19,920, now pending in our Supreme Court, a diminution of the record on file therein has been suggested:

You are hereby commanded to send up to our Supreme Court, duly certified, under your hand and the Seal of said Circuit Court, a true transcript of

1st. The Judgment of the Lower Court.

2nd. Exhibit A, to the agreed statement of facts, said Exhibit being the original telegram containing the stipulations of the contract entered into by appellee and appellant for the transmission of a certain message, which message is already copied into the Record together with this Writ, so that the same be before our Supreme Court, *instanter*. Herein fail not.

Witness, the Hon. Sydney Smith, Chief Justice of said Court, and the Seal thereof, at Jackson, this the 8th day of December, A. D., 1917.

GEO. C. MYERS, Clerk.
By W. J. BROWN, D. C.

(SEAL)

JUDGMENT.

WARREN-GODWIN LUMBER CO.,

v.

POSTAL TELEGRAPH & CABLE CO.

No. 3,367.

This cause coming on to be heard by consent before Hon. W. C. Wells, in open court, on agreed statement of facts, a jury being waived, and the court having heard and considered the matter, is of the

opinion that the plaintiff is limited in this cause to the recovery of twenty-five cents (25c) the price paid for the transmission of the message; and it further appearing that the defendant tendered to the plaintiff the said sum of twenty-five cents (25c) before the institution of this suit, it is ordered and adjudged that the defendant Warren-Godwin Lumber Company, do have of and recover from the Postal Telegraph Company the sum of twenty-five cents (25c) with no costs and that the Postal Telegraph Company do have of and recover from the Warren-Godwin Lumber Company all costs in this behalf expended. In each of which cases let execution issue.

M. B. 17 Page 617.

Saturday, September 30, 1916.

EXHIBIT "B."

WESTERN UNION TELEGRAM.

5 H. M. 32 BLUE

Toledo, Ohio, 1:59 P. M., Dec. 23.

WARREN-GODWIN LBR. CO.

Jackson, Miss.

Message received, can book our order, three transit cars, eight inch two shiplap if good grade soda dipped or kiln dried and your price billing to ourselves, Herrick Ills. care Clover Leaf.

D. J. PETERSON LBR. CO.

3 P. M.

EXHIBIT "A."

Postal Telegraph—Commercial Cables

TELEGRAM.

POSTAL TELEGRAPH - COMMERCIAL CABLES

CLARENCE H. MACKAY, PRESIDENT

The Postal Telegraph-Cable Company (incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

Design Patent No. 40529

Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

Jackson, Miss., 12, 23, '15.

D. J. PETERSON LUMBER CO.,
Toledo, Ohio.

Offer three transit cars, eight inch two shiplap twenty-two dollars, answer quick.

WARREN-GODWIN LUMBER CO.
No. 2.

(Back of Telegram)

POSTAL TELEGRAPH-CABLE COMPANY
IN CONNECTION WITH
THE COMMERCIAL CABLE COMPANY.

The greatest Telegraph and Cable System in the World. Extends over two-thirds of the way around the earth. The Postal Telegraph-Cable Company (incorporated)

Transmits and delivers the within message subject to the following terms and conditions:

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors

in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of the Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: one per cent. for any distance not exceeding 1,000 miles, and two per cent, for any greater distance.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of this Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

This Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

This is an UNREPEATED Message and is transmitted and delivered by request of the sender under the conditions named above. Errors can be guarded against only by repeating a message back to the sending station for comparison.

The above terms and conditions shall be binding upon the receiver as well as the sender of this message.

No employee of this Company is authorized to vary the foregoing.

Clarence H. Mackay, President
Edward J. Nally, Vice-Prest. and General Manager.
Charles C. Adams, Second Vice-President.
Charles P. Bruch, Third Vice-President.

Postal Telegraph — Fastest Service in the World.

CLERK'S CERTIFICATE.

STATE OF MISSISSIPPI,
County of Hinds.

I, E. D. Fondren, Clerk of the Circuit Court, in and for the County of Hinds, in said State, do hereby certify that the foregoing is a true copy of the judgment and the original telegrams filed in the above cause as Exhibits to the agreed statement of facts.

Given under my hand and Official Seal, this the 7th day of December, 1917.

E. D. FONDREN, Clerk.
J. P. CADWALLADER, D. C.

(SEAL)

IN THE SUPREME COURT OF MISSISSIPPI,

October Term, 1917.

Monday, February 4th, 1918.

WARREN-GODWIN LUMBER COMPANY,
v.
POSTAL TELEGRAPH-CABLE COMPANY.

No. 19,920.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Hinds County, and this Court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the September term, 1916, be, and the same is hereby reversed, and this Court proceeding now, here, to enter such judgment as should have been entered in the Court below, doth order and adjudge that appellant do have and recover of appellee, the sum of one hundred and twenty-five and 28-100 dollars, the amount admitted to have been the loss, with interest on said sum from the 30th day of October, 1916, until paid, at the rate of six per centum per annum, and also the costs of this cause in this Court, and in the Court below to be taxed, &c.

DIVISION B, ETHRIDGE, J.

WARREN-GODWIN LUMBER CO.,

19,920 v.

POSTAL TELEGRAPH-CABLE COMPANY.

Warren-Godwin Lumber Co., a corporation under the laws of the State of Mississippi, engaged in manufacturing and selling lumber, addressed the following telegram to the D. J. Peterson Lumber Co., of Toledo, Ohio: "Offer three transit cars eight inch two shiplap twenty-two dollars, answer quick. WARREN-GODWIN LUMBER CO." This telegram was delivered to the Postal Telegraph Co., at Jackson, Mississippi, and the message fee paid, but in transmitting the message to the D. J. Peterson Lumber Co. the word "two" was left out and made the telegram read "$20" instead of "$22." On receipt of the message in this form that company replied as follows: "Message received. Can book our order three transit cars eight inch two shiplap if good grade soda dipped or kiln dried and your price. Billing to ourselves Derrick, Ills., care Clover Leaf." The message sent from Jackson to the D. J. Peterson Lumber Co. contained the stipulation on the back thereof providing that the company's liability for error in sending an unrepeated message would be limited to the amount paid for the transmission of the message. The Warren-Godwin Lumber Co. shipped the lumber as directed to the Peterson Lumber Co. and presented its bill for $22 per thousand but that company declined to pay the $2 per thousand. It is admitted that the amount of loss suffered by the plaintiff is $125.28, and it is agreed that the telegraph company tendered back the amount paid for the transmission of the telegram. The case was tried below before a special judge on agreed statement of facts, jury being waived, and the judge rendered judgment for the telegraph company. The cause was decided before the decision by this Court in the case of *Dickerson v. Western Union*

Telegraph Co., 114 Miss., 115, 74 So., 779, and the appellee admits that unless the Dickerson case is overruled that the appellant is entitled to judgment, but insists that the Dickerson case should be overrruled. This Court decided in the case of *Postal Telegraph Co. v. Wells*, 82 Miss., 733, 35 So., 190, that the company could not contract against its own negligence and that the stipulation on the back of a telegram undertaking to exempt the telegraph company from liability for its negligence in transmitting a message, though an unrepeated one, was invalid and that the company is responsible for losses occasioned by its negligence in transmission. See also *Western Union Telegraph Co. v. Goodbar*, 7 So., 214. We think these cases and the Dickerson case rule this case and decline to overrule the Dickerson case. It follows that the judgment should be reversed and judgment here entered for $125.28, which is accordingly done.

Reversed and judgment here.

STEVENS, J., SPECIALLY CONCURRING:

I concur in the judgment to be rendered in this case but solely for the reason that *Dickerson v. Western Union Telegraph Co.*, 74 So., 779, unless overruled, controls the present case. I dissented from the opinion of the court in the Dickerson case, and I still adhere to the views which I entertained at the time the Dickerson opinion was rendered. In fact, the splendid argument and the authorities collated in the brief of learned counsel for appellee only confirm my personal opinion on the legal questions involved in this as well as in the Dickerson case.

STATE OF MISSISSIPPI,
Hinds County.

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing — pages contain a true

and correct transcript of the record and proceedings in said Supreme Court in the case of *Warren-Godwin Lumber Co. vs. The Postal Telegraph-Cable Company*, No. 19,920, on the docket of said Court, as the same appear of record on file in my office.

Given under my hand with the Seal of said Court affixed, at office in the City of Jackson, Mississippi, this the 21st day of March A. D. 1918.

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Being informed that there is now pending before you a suit in which Warren-Godwin Lumber Company is appellant, and Postal Telegraph-Cable Company is appellee, No. 19,920, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Hinds County, Mississippi, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of June, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,452. Supreme Court of the United States, No. 985, October Term, 1917. Postal Telegraph-Cable Company vs. Warren-Godwin Lumber Company. Duplicate Writ of Certiorari.

In the Supreme Court of Mississippi.

WARREN-GODWIN LUMBER COMPANY

v.

POSTAL TELEGRAPH-CABLE COMPANY.

Stipulation of Counsel.

It is agreed by and between G. Ed. Williams, Attorney for Warren-Godwin Lumber Company, the appellant in the above styled cause, and J. N. Flowers, attorney for Postal Telegraph-Cable Company, the appellee in the said cause, that the certified transcript of the record in this cause filed in the Supreme Court of the United States along with the petition for writ of certiorari in the said cause may be taken and treated by the Supreme Court of the United States as the record in this cause for all the purposes for which the record is to be used by the Supreme Court of the United States. And that a copy of this stipulation duly certified by the Clerk of this Court and transmitted to the Clerk of the Supreme Court of the United States may

be taken as a return to the writ of certiorari issued by the Clerk of the Supreme Court of the United States in the said cause on the 6th day of June, 1918.

G. E. WILLIAMS,
Attorney for Warren-Godwin Lumber Co.
J. N. FLOWERS,
Attorney for Postal Telegraph-Cable Company

STATE OF MISSISSIPPI:

I Geo. C. Myers, Clerk of the Supreme Court od the State of Mississippi hereby certify the above and foregoing to be a full, true and correct copy of the original stipulation filed in the cases stated in the Caption as the same remains on file in my office.

Given under my hand and the Seal of sais Supreme Court at ofiice in the City of Jackson, this the 15th day of October, 1918.

[Seal State of Mississippi, Supreme Court.]

GEO. C. MYERS,
Clerk,
By W. J. BROWN,
D. C.

STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that in obedience to the attached writ of certiorari I have made up and certified to the Supreme Court of the United States the record and proceedings had and done in the Supreme Court of Mississippi in a certain cause styled Warren-Godwin Lumber Company vs. Postal Telegraph-Cable Company No. 19,920 on the docket of said Court, and delivered same to Mr. J. N. Flowers attorney for the Postal Telegraph-Cable Co. appellant in said cause.

Given under my hand with the seal of said Court affixed at office in the City of Jackson, Mississippi, this the 15th day of October, A. D. 1918.

[Seal State of Mississippi, Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

[Endorsed:] File No. 26,452. Supreme Court U. S., October term, 1918. Term No. 420. Postal Telegraph-Cable Co., petitioner, vs. Warren-Godwin Lumber Co. Writ of certiorari and return. Filed Oct. 18, 1918.

INDEX.

Petition 1

Brief in Support of Petition 5

Notice to Respondent 11

Motion 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 19 920.

POSTAL TELEGRAPH-CABLE COMPANY.
PETITIONER.

v.

WARREN-GODWIN LUMBER COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Justices of the Supreme Court of the United States:

1. Petitioner, the Postal Telegraph-Cable Company, is a corporation chartered under the laws of the State of New York, and the respondent is a corporation chartered under the laws of the State of Mississippi.

2. On the 23d day of December, 1915, the Warren-Godwin Lumber Company delivered to petitioner at Jackson, Mississippi, a telegram to be transmitted to D. J. Peterson Lumber Company, at Toledo, Ohio, as follows: 'Offer three transit cars eight inch two shiplap twenty-two dollars—answer quick." In transmission the telegraph company made a mistake and as delivered to the addressee the message read "Offer three transit cars eight inch two shiplap twenty dollars—answer quick." The message as delivered to addressee offered to Peterson Lumber Company the lumber at twenty dollars per thousand instead of twenty-two dollars per thousand, a difference of two dollars per thousand.

3. The form on which the message was written was the form in general use by the petitioner and the contract printed on the back of this form among other things contains the following:

"THE POSTAL TELEGRAPH-CABLE COMPANY (Incorporated) Transmits and Delivers the within Telegram Subject to the following Terms and Conditions:

"To guard against mistakes or delays the sender of a telegram should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, *This is an Unrepeated Telegram and Paid for as Such*, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* telegram beyond the amount received for sending the same. *Unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for Errors in Cipher or Obscure Telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery or for the non-delivery of this telegram, whether caused by the negligence of its servants or otherwise beyond fifty times the *repeated* telegram rate, at which amount this telegram, if sent as a *repeated* telegram, is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

"6. The Company shall not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

4. This was an unrepeated message and no claim in writing covering damages demanded was presented to the petitioner within 60 days.

5. On the 17th day of May, 1916, suit was filed in the Court of a Justice of the Peace in Hinds County, Mississippi, to recover $125.00, the difference between $22.00 per thousand and $20.00 per thousand for the lumber shipped, the amount of lumber being about 62,500 feet. Judgment was rendered in the Justice Court for the Warren-Godwin Lumber Company in the sum claimed. On appeal to the Circuit Court for the First Judicial District of Hinds County, where the cause was tried *de novo* judgment was rendered for the telegraph company, but it was held that the plaintiff, Warren-Godwin Lumber Company, was entitled to a refund of the toll paid, to-wit, 25 cts. The case was then by the plaintiff lumber company carried by appeal to the Supreme Court of the State where the judgment of the circuit court was reversed and judgment final entered against this petitioner for the full amount claimed, namely, $125.00, with interest from the date the claim arose. (Printed Tr. P. —.) This said final judgment was rendered by the highest Court in the State in which a decision in the suit could be had.

6. The only question presented to the Supreme Court was whether by the Act of June 18, 1910, Congress has assumed control of telegraph companies handling interstate business. It was contended by this petitioner that the rights, duties and liabilities growing out of a contract for the transmission of a telegram from a point in Mississippi to a point in Illinois are to be governed by the said Act of Congress (36 Stat. at Large, 545, Vol. 1, 1912, Supp. Fed. Stat. Ann. p. 113.). By the Warren-Godwin Company, the respondent here, it was contended that the said Act of Congress should not be taken into consideration by the Court in determining the rights and liabilities of the parties to a contract for the handling of an interstate telegram.

7. The opinion of the Supreme Court dealing with these rival contentions appears on page — of the printed transcript submitted herewith.

8. The Supreme Court of Mississippi denied the defenses set up by the telegraph company based upon the contract stipulations limiting its liability for mistakes in the handling of unrepeated messages and requiring claims to be presented in writing within 60 days from the date of the filing of the telegram for transmission. The Supreme Court of Mississippi held that the said Act of Congress manifests no purpose to supplant the State regulations; that Congress has not taken control of the subject in the sense that the said Act and the rules of decision of the Federal Courts must be referred to in passing upon the rights and liabilities of the parties growing out of such a contract. The Court referred for a full expression of its views upon the question to the case of *Dickerson vs. Western Union Telegraph Company* 114 Miss., 115, 74 So. Rep. 779. The opinion of the Court in the Dickerson case is here referred to as part of this petition.

9. This petitioner has been denied a right given it by the said Act of June 18, 1910, and its defense based upon the said Act and upon the rules of the Federal decisions has been by the Supreme Court of Mississippi disallowed.

10. The record presented to the Supreme Court of Mississippi presented this question alone, that is, as to the applicability of the State or of the Federal laws. The issue is not presented by the pleadings because the suit originated in the Court of a Justice of the Peace, and such suits are tried without written pleadings. See Sec. 2730, Mississippi Code of 1906.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant the writ of *certiorari* in this case directed to the Supreme Court of Mississippi to bring up this case to this Court for such proceedings therein as to this Honorable Court may seem just.

POSTAL TELEGRAPH-CABLE COMPANY.

By.....

Attorney.

peated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates, may be charged for the different classes of messages."

III.

So, therefore, the question is whether Congress by its action in the passage of the amendatory Act of June 18, 1910, above quoted, has taken possession and control of the field of interstate commerce by telegraph.

We find the Act creating them common carriers within the meaning of the Act. We find it stipulating that the rates shall be just and reasonable. We find it authorizing the creation of classes such as repeated, unrepeated, etc., and the charging of different rates in such cases. In the use of the words "repeated" and "unrepeated" Congress is but adopting terms which have their own peculiar significance acquired through years of usage by telegraph companies. And so with the other classifications.

The amendatory Act under discussion was written and enacted in full view of a practice which has been engaged in for years and years by the telegraph companies and in full view of the case of *Primrose vs. Western Union Telegraph Company*, 154 U. S. 1, 38 L. Ed. 883, which case analyzes the contract of the telegraph company, discusses its policy, and adjudges its legality.

The passage of the Carmack Amendment presents an analagous situation. It was passed at a time when the States were controlling by their own interpretation of the law the liability of carriers by rail to the shipper. This amendment provides that a bill of lading shall issue; that the initial carrier shall be liable for loss or damage to the initial holder whenever caused.

This Court in the case of *Adams Express Company vs. Croninger*, 226 U. S. 491, 57 L. Ed. 314, held this Act to be evidence of the intention of Congress to take possession of the subject of the liability of a carrier under an interstate contract of shipment.

We submit that the Act of June 18, 1910, is as broad in its scope as the Carmack Amendment and evinces the purpose of Congress to take possession of the subject of an interstate telegraph carrier's contract of transmission.

But the Act in question has been construed in this regard by several courts and we call the Court's attention to their views.

In the case of *Haskell Implement Company vs. Postal Telegraph-Cable Company*, 96 Atl., 219, the Supreme Court of Maine thus decides:

> "By the Act of June 18, 1910, telegraph companies have been made common carriers within the meaning and subject to the provisions of the Interstate Commerce Act. Being so subject as to all questions of classification, regulation, and procedure and especially where, as in this case, the reasonableness and the rules and charges, and the limitation of liability are in question, state courts are without jurisdiction; and such cases must be brought in the Federal Court, or be submitted for the determination of the Interstate Commerce Commission as in the case of other common carrier coming within the administrative competency of that Commission."

In the case of *Western Union vs. Bank of Spencer* 156 Pac. 1175, the Supreme Court of Oklahoma in speaking of this enactment said:

> "It is apparent that Congress has undertaken to occupy the field of interstate commerce by telegraph and assume exclusive jurisdiction and authority in the regulation thereof, and has specifically prescribed the rules which govern business of this character."

In the case of *Gardner vs. Western Union*, 230 Fed. 405, 8th C. C. A. now found in Advance Sheets of Federal Reporter of June 8, 1916, the Circuit Court of Appeals said:

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> "Congress has taken possession of the field of interstate commerce by telegraph and it results that the power of the states to regulate with reference thereto has been suspended."

The Supreme Court of Kansas, in the case of *Bailey vs. Western Union Telegraph Company*, 156 Pac. 716, said:

> "Prior to the passage of the Act of Congress in June 1910, whatever may have been the law governing the right to recover damages on account of the delay in the delivery of telegraphic messages, since the passage of that the decisions appear almost unanimous that the limitations on the liability of telegraph companies for damages caused by delay in delivering the message are governed by the regulation above set out and that no other recovery may be had."

In the case of *Western Union vs. Bilisoly*, 116 Va. 562, 82 S. E. 91, the Supreme Court of Appeals of Virginia thus ruled:

> "By an Act of Congress, approved June 18, 1910, telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and are subject, so far as applicable, to the same rules, restrictions and penalties that are imposed upon carriers. This Act has occupied the entire field and taken complete control of the regulation of telegraph companies. * * * * It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the State statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The Act of Congress has ousted the State of jurisdiction over the subject."

See the case of *Western Union Telegraph Company vs. Banks*, 83 S. E. 424 (Va.), which reaffirms the holding of the Bilisoly case.

The case of *Strause Gas Iron Company vs. Western Union Telegraph Company*, from the municipal court of Philadelphia, 23 District Court 291, affirmed on appeal the affirmance reported in 59 Pa. Superior Court Reporter 122.

See also *Western Union Telegraph Company vs. Compton* (Arkansas) 169 S. W., 946;
Western Union Telegraph Company vs. Johnson (Arkansas), 171 S. W. 859;
Western Union vs. Dant, D. C. 42 Wash. L. Report, 722;
Western Union vs. Simpson (Ark. 1915) 174 S. W. 232;
Western Union vs. Stewart (Ark. 1915) 179 S. W. 813;
Western Union vs. Lee (Ky. 1917), 192 S. W. 70;
Western Union vs. Schade (Tenn., 1917), 192 S. W. 924;
Durre vs. Western Union (Wis.), 161 N. W. 755;
Gardiner vs. Western Union, 231 Fed. 405;
Western Union vs. Foster (Mass.), 113 N. E. 192.;
Poor vs. Western Union (Mo. 1917), 196 S. W. 28;
Williams vs. Western Union, 203 Fed. 140.

IV.

The Transcript presented herewith does not show any pleadings. But the question was raised in such manner as to get the consideration of the Supreme Court of Mississippi. The suit originated in the Court of a Justice of the Peace, and no pleadings in writing are filed. At least, it is not necessary to file any written pleadings. In such courts "everything is conducted *ore tenus*." *Roberts vs. Weiler*, 52 Miss., 299. From the opinion of the Supreme Court it will be seen that this question as to the applicability of the Act of June 18, 1910, was the only question considered. See Tr. p. —. The Court referred to the case of *Western Union vs. Dickerson*, 114 Miss., 115, in which case the question is considered at length. It was recognized by the Court and by counsel that the defense interposed would be good if the said statute was to be taken into consideration; and that the defenses would not be good if the case was to be controlled by the decisions of the Supreme Court of Mississippi.

Respectfully submitted,

J. N. FLOWERS
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the Petition of the Postal Telegraph-Cable Company for writ of *certiorari* directed to the Supreme Court of Mississippi to bring before the Supreme Court of the United States the case of—

POSTAL TELEGRAPH-CABLE COMPANY

vs.

WARREN-GODWIN LUMBER COMPANY.

SIRS:

Please take notice that, upon a certified copy of the transcript of the record herein and upon the annexed petition and the brief accompanying it, filed on behalf of the petitioners herein and duly sworn to, I shall move the motion hereto annexed before the Supreme Court of the United States, at the capital, in the city of Washington, District of Columbia, on Monday the 13th day of May 1918, at the opening of the Court on that day, or as soon thereafter as counsel can be heard; and that I shall then and there move for such further relief in the premises as may be just.

Witness my hand this 6th day of April, 1918.

J. N. FLOWERS
Attorney for Petitioner.

To G. Edward Williams, Esq. Attorney for Warren-Godwin Lumber Co., Jackson, Miss.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the petition of the Postal Telegraph-Cable Company for writ of *certiorari* directed to the Supreme Court of Mississippi to bring before the Supreme Court of the United States the case of—

POSTAL TELEGRAPH-CABLE COMPANY

vs.

WARREN-GODWIN LUMBER COMPANY.

And now comes the petitioners herein Postal Telegraph-Cable Company, by its Attorney, and moves this Court upon certified copy of the Transcript of the Record herein and upon the annexed petition duly sworn to, for writ of *certiorari* directed to the Supreme Court of Mississippi, to bring before this Honorable Court the case of *Postal Telegraph-Cable Company vs. Warren-Godwin Lumber Company*, recently decide d by the Supreme Court of Mississippi, for such proce edin therein as to this Court may seem just and for such other and further relief as may be just.

J. N. FLOWERS,
Attorney for Petitioner.

I acknowledge receipt of copies of the above and foregoing petition, brief, motion and notice, all of which have this day been delivered to me, this the.....day of April, 1918.

.....

No. [redacted]91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

POSTAL TELEGRAPH-CABLE COMPANY,
Petitioner.

vs.

WARREN-GODWIN LUMBER COMPANY,
Respondent.

BRIEF FOR PETITIONER.

ELLIS B. COOPER,
J. T. BROWN,
J. N. FLOWERS,
Attorneys for Petitioner.

SUBJECT INDEX.

General Statement 1
Statement of Facts 2- 4
Brief of Argument 5- 7
Transmission of messages from one state to another by telegraph is interstate commerce 7
The power to regulate and control interstate commerce is vested in Congress 8
When Congress acts, state laws on the same subject are superseded 8
The inaction of Congress in no wise affected its power over the subject 9
By the act of June 18, 1910, Congress has undertaken to occupy the field of interstate commerce by telegraph and assume exclusive jurisdiction and authority in the regulation thereof 9-18
Authorities to the Contrary:
(a) Mississippi Case 19-30
(b) Texas Case 30-35
(c) Indiana Case 35-36
(d) Arkansas Case 36-38
Action in tort or action ex contractu 38
No requirement as to the publication, filing and posting of telegraph rate schedules 39
No formal pleadings necessary in this case 40
Conclusion 41

CASES CITED.

Adams Express Co. vs. Croninger, 266 U. S. 491, 57 L. Ed. 314 5
Bailey vs. Western Union Tel. Co., 156 Pac. 716 6
Bateman vs. Western Union Tel. Co., 93 S. E. 567, L. R. A. 1918A 803 6
Boyce vs. Western Union Tel. Co., 89 S. E. 106 6
Cultra vs. Western Union Tel. Co., 44 I. C. C. 670 6
C. N. O. & T. P. R. R. Co. vs. Rankin, 241 U. S. 319, 60 L. Ed. 1022 7
Dickerson vs. Western Union Tel. Co., 114 Miss. 115, 74 So. 779 7
Des Arc Oil Mill Co. vs. Western Union Tel. Co., 201 S. W. 273 7
Durre vs. Western Union Tel. Co., 161 N. W. 755 6

Erie Railroad Co. vs. New York, 233 U. S. 671, 58 L. Ed. 1149 5
Gardiner vs. Western Union Tel. Co., 230 Fed. 405, 243 U. S. 108, 61 L. Ed. 944 6
Glouchester Ferry Co. vs. Pennsylvania, 114 U. S. 196 29 L. Ed. 158 5
Haskell Implement Co. vs. Postal Telegraph-Cable Co., 96 Atl. 219 6
Jones vs. Southern Express Co., 61 So. 165 5
Meadows vs. Postal Telegraph-Cable Co., 91 S. E. 1009 6
Mondou vs. N. Y. N. H. & H. R. R. Co., 223 U. S. 1, 56 L. Ed. 327 5
Norris vs. Western Union Tel. Co., 93 S. E. 465 6
Northern Pacific R. Co. vs. Washington, 222 U. S. 370, 56 L. Ed. 237 5
Primrose vs. Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883 7
Reid vs. Colorado, 187 U. S. 137, 47 L. Ed. 108 5
Roberts vs. Weiler, 52 Miss. 299 7
Rodd vs. Heartt, 21 Wal. 558, 22 L. Ed. 654 5
St. L. & S. F. R. R. Co. vs. Woodruff Mills, 62 So. 171 5
Section 86 Mississippi Code 1906 7
Smith vs. Alabama, 124 U. S. 465, 31 L. Ed. 508 5
Western Union Tel. Co. vs. Crovo, 220 U. S. 364, 55 L. Ed. 498 5
Western Union Tel. Co. vs. James, 162 U. S. 650, 40 L. Ed. 1105 5
Western Union Tel. Co. vs. Texas, 105 U. S. 460, 26 L. Ed. 1067 5
Western Union Tel. Co. vs. Bank of Spencer, 156 Pac. 1175 6
Western Union Tel. Co. vs. Bilisoly, 116 Va. 562, 82 S. E. 91 6
Western Union Tel. Co. vs. Banks, 83 S. E. 424 6
Western Union Tel. Co. vs. Schade, 192 S. W. 924 6
Western Union Tel. Co. vs. Lee, 192 S. W. 70 6
Western Union Tel. Co. vs. Foster, 113 N. E. 192 6
Western Union Tel. Co. vs. Hawkins, 73 So. 973 6
Western Union Tel. Co. vs. Dant, 42 App. D. C. 398 L. R. A. 1915B 685 6
Western Union Tel. Co. vs. Bailey, 196 S. W. 516 7
Western Union Tel. Co. vs. Boegli, 115 N. E. 773 7
White vs. Western Union Tel. Co. 38 I. C. C. 500 7
Williams vs. Western Union Tel. Co., 203 Fed. 140 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

NO. 420.

POSTAL TELEGRAPH-CABLE COMPANY,
Petitioner.

vs.

WARREN-GODWIN LUMBER COMPANY,
Respondent.

BRIEF FOR PETITIONER.

GENERAL STATEMENT.

This case comes here from the Supreme Court of the State of Mississippi. The petitioner, Postal Telegraph-Cable Company, was defendant in a suit brought by respondent, Warren-Godwin Lumber Company, whereby it was sought to recover from the telegraph Company damages in the sum of $125.00 growing out of the handling of a telegram between Jackson in the State of Mississippi, and Toledo, in the State of Ohio.

STATEMENT OF FACTS.

This case was tried on an agreed statement of facts. It was agreed that the respondent, Warren-Godwin Lumber Company, delivered the following message to the telegraph company for transmission:

"Jackson, Mississippi, December 23rd, 1915.
D. J. Peterson Lumber Company,
Toledo, Ohio.
Offer three transit cars eight inch two shiplap twenty-two dollars answer quick.
WARREN-GODWIN LUMBER COMPANY."

The telegraph company accepted the message as an ordinary unrepeated message and received therefor the regular tariff rate for handling a message of that class. An error was made in transmission and when delivered to the addressee at Toledo, Ohio, the telegram read:

"Offer three transit cars eight inch two shiplap *twenty* dollars answer quick."

The addressee, D. J. Peterson Lumber Company, telegraphed its acceptance on December 23rd. On the 24th the three cars were reconsigned to D. J. Peterson Lumber Company as directed in their telegram of acceptance. It was later discovered that an error had been made in the transmission of the first telegram, and that when delivered to the D. J. Peterson Lumber Company the offer of Warren-Godwin Lumber Company read *twenty* dollars instead of *twenty-two*. This suit was brought against the telegraph company to recover the amount lost by reason of the error, that is the difference between twenty and twenty-two dollars per thousand feet. This amounted to $125.50.

The original suit was filed before a justice of the peace and was tried and disposed of before him. It was then appealed to the Circuit court of Hinds County, Mississippi. In both courts the cause proceeded without written pleadings. This was in accordance with the Mississippi practice.

The original telegram sent by defendant in error was introduced. It was an "unrepeated" message and the terms and conditions subject to which it was accepted for transmission were fully set forth on the blank on which it was written when tendered for transmission. In words and figures these conditions are as follows:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent for any distance not exceeding 1,000 miles and two per cent for any greater distance.

This is an unrepeated message and is transmitted and delivered by request of the sender under the conditions named above. Errors can be guarded against only by repeating a message back to the

sending station for comparison. The above terms and conditions shall be binding upon the receiver as well as the sender of this message."

The only question considered in the trial courts and in the Supreme Court of Mississippi, as will be observed from the opinion of that court, which is made a part of the record in this case at pp. 21 and 22 of the transcript, was the applicability of the Act of Congress of June 18, 1910. It was recognized by the court and by counsel that the defense interposed, to-wit: the limitation of the recovery to the amount paid for the message as shown by the contract of transmission, would be good if the act applied, and that the defense would not be good if the case was to be controlled by the decisions of the Supreme Court of the State of Mississippi. The telegraph company tendered the amount paid for the transmission of the telegram prior to the filing of the suit. It was refused by the plaintiff. The trial court sustained the defense on the ground that the case was to be controlled by the said act of Congress, and limited the recovery to the amount paid for the transmission of the message. There was an appeal to the Mississippi Supreme Court and the judgment of the trial court was reversed and a judgment final entered against the telegraph company for the amount sued for. The Mississippi Court holds that the Act of Congress of June 18, 1910, does not apply to cases of this sort, and that they are to be disposed of according to the law of the state and the decisions of the state court.

The only question presented here is whether, under the interstate commerce law, as amended by the Act of June 18, 1910, state laws regulating the contract obligations and liability of common carriers of interstate telegrams have been superseded and annulled, that is whether this case should be controlled by the rules and decisions of the Federal Courts or of the Supreme Court of the State of Mississippi.

BRIEF OF THE ARGUMENT.

The transmission of messages from one state to another by telegraph is interstate commerce.

Western Union Telegraph Company vs. Crovo, 220 U. S. 364, 55 L. Ed. 498.

Western Union Telegraph Company vs. James, 162 U. S. 650, 40 L. Ed. 1105.

Western Union Telegraph Company vs. Texas, 105 U. S. 460, 26 L. Ed. 1067.

The power to regulate and control interstate commerce is vested in Congress.

Adams Express Company vs. Croninger, 266 U. S. 491, 57 L. Ed. 314.

Mondou vs. N. Y. N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327.

Reid vs. Colorado, 187 U. S. 137, 47 L. Ed. 108.

Smith vs. Alabama, 124 U. S. 465, 31 L. Ed. 508.

When Congress acts, state laws on the same subject are superseded.

Adams Express Company vs. Croninger, 226 U. S. 491, 57 L. Ed. 314.

Erie Railroad Company vs. New York, 233 U. S. 671, 58 L. Ed. 1149.

Railroad vs. Harris, 234 U. S. 419, 58 L. Ed. 1377.

Northern Pacific R. Company vs. Washington, 222 U. S. 370, 56 L. Ed. 237.

Jones vs. Southern Express Company, 61 So. 165.

St. L. & S. F. R. R. Co. vs. Woodruff Mills, 62 So. 171.

The inaction of Congress in no wise affected its power over the subject.

Glouchester Ferry Company vs. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158.

Mondou vs. R. R. Company, 223 U. S. 1, 56 L. Ed. 327.

Rodd vs. Heartt, 21 Wall. 558, 22 L. Ed. 654.

By the Act of June 18, 1910, Congress has undertaken to occupy the field of interstate commerce by telegraph and assume exclusive jurisdiction and authority in the regulation thereof.

Bailey vs. Western Union Telegraph Company, 156 Pac. 716.

Bateman vs. Western Union Telegraph Co., 93 S. E. 467, L. R. A. 1918A 803.

Boyce vs. Western Union Telegraph Company, 89 S. E. 106.

Cultra Unrepeated Message Case No. 8917, 44 I. C. C. 670.

Durre vs. Western Union Telegraph Company, 161 N. W. 755.

Gardiner vs. Western Union Telegraph Co., 230 Fed, 405, 243 U. S. 108, 61 L. Ed. 944.

Haskell Implement Co. vs. Postal Telegraph-Cable Company, 96 Atl. 219.

Meadows vs. Postal Telegraph-Cable Company, 91 S. E. 1009.

Norris vs. Western Union Telegraph Company, 93 S. E. 465.

Western Union Tel. Co. vs. Bank of Spencer, 156 Pac. 1175.

Western Union Telegraph Co. vs. Bilisoly, 116 Va. 562, 82 S. E. 91.

Western Union Telegraph Company vs. Banks, 83 S. E. 424.

Western Union Telegraph Company vs. Schade, 192 S. W. 924.

Western Union Telegraph Company vs. Lee, 192 S. W. 70.

Western Union Telegraph Company vs. Foster, 113 N. E. 192.

Western Union Telegraph Co. vs. Hawkins, 73 So. 973.

Western Union Telegraph Company vs. Dant, 42 App. D. C. 398, L. R. A. 1915B 685.

Williams vs. Western Union Telegraph Co., 203 Fed. 140.

White vs. Western Union Telegraph Company, 38 I. C. C. 500.

Authorities that hold to the contrary.

Dickerson vs. Western Union Telegraph Co., 114 Miss. 115, 74 So. 779.

Western Union Telegraph Company vs. Bailey, 196 S. W. (Texas) 516.

Western Union Telegraph Company vs. Boegli, 115 N. E. (Ind.) 773.

Des Arc Oil Mill Co. vs. Western Union Tel. Co., 201 S. W. (Ark.) 273.

Action in tort or action *ex contractu.*

Western Union Tel. Co. vs. Bank of Spencer, 156 Pac. 1175.

Primrose vs. Western Union Telegraph Co., 154 U. S. 1, 38 L. Ed. 883.

There is no requirement as to the publication, filing and posting of telegraph schedules of rates.

Report of Interstate Commerce Commission to Congress December 20th, 1911.

White vs. Western Union Telegraph Company, 38 I. C. C. 500.

C. N. O. & T. P. R. R. Co. vs. Rankin, 241 U. S. 319, 36 Sup. Ct. Rep. 555, 60 L. Ed. 1022.

No formal pleadings necessary in this case.

Roberts vs. Weiler, 52 Miss. 299.

Section 86, Mississippi Code 1906.

THE TRANSMISSION OF MESSAGES FROM ONE STATE TO ANOTHER BY TELEGRAPH IS INTERSTATE COMMERCE.

That the transmission of messages from one state to another by telegraph is interstate commerce is beyond dispute. *Western Union Telegraph Company vs. Texas,* 105 U. S. 460, L. Ed. 1067; In the case of *Western Union Telegraph Company vs. Crovo,* 220 U. S. 364, 55 L. Ed. 498 it was said:

"That companies engaged in the telegraph business, whose lines extend from one state to another are engaged in interstate commerce, and that messages passing from one state to another constitute such commerce is indisputable."

And in *Western Union Telegraph Company vs. James,* 162 U. S. 650, 40 L. Ed. 1105 this court said:

"It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce * * and that messages passing over such lines from one state to another constitute a portion of commerce itself."

THE POWER TO REGULATE AND CONTROL INTERSTATE COMMERCE IS VESTED IN CONGRESS.

We deem it a useless consumption of time to argue that the power to regulate and control interstate commerce is vested in Congress and that such power is supreme and exclusive of the power of the states.

"The grant of power to Congress in the constitution to regulate commerce with the foreign nations and among the several states is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the state." *Smith vs. Alabama,* 124 U. S. 465, 31 L. Ed. 508; *Reid vs. Colorado,* 187 U. S. 137, 47 L. Ed. 108; *Mondou vs. N. Y. N. H. & H. R. R. Co.,* 223 U. S. 1, 56 L. Ed. 327; *Adams Express Company vs. Croninger,* 226 U. S. 491, 57 L. Ed. 312.

WHEN CONGRESS ACTS, STATE LAWS ON THE SAME SUBJECT ARE SUPERSEDED.

It is well settled that when Congress has exercised its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. *Adams Express Co. vs. Cronin-*

ger, 226 U. S. 491, 57 L. Ed. 316; *Erie Railroad Co. vs. New York*, 233 U. S. 671, 58 L. Ed. 1149; *Railroad Co. vs. Harris*, 234 U. S. 419, 58 L. Ed. 1377; *Northern Pacific R. Co. vs. Washington*, 222 U. S. 370, 56 L. Ed. 237.

And this is conceded by the Mississippi Court. *Jones vs. Express Company*, 61 So. 165; *St. L. & S. F. R. R. Co. vs. Woodruff Mills*, 62 So. 171.

THE INACTION OF CONGRESS IN NO WISE AFFECTED ITS POWER OVER THE SUBJECT.

It is true that the states by their own decisions and declarations of policy have heretofore measured the liability of telegraph companies when engaged in interstate commerce. And it is true that this action on the part of the states was declared to be lawful. But this was due to the fact that Congress had not acted, and had not indicated its intention of assuming control of this field of interstate commerce. But the failure of Congress to act in no way affected or impaired its right.

> "The inaction of Congress, however, in no wise affected its power over the subject. *Rodd vs. Heartt*, 21 Wall. 558, 22 L. Ed. 654; *Glouchester Ferry Co. vs. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158. And now that Congress has acted, the laws of the state, in so far as they cover the same field, are suspended, for necessarily that which is not supreme must yield to that which is." *Mondou vs. N. Y. N. H. & H. R. R. Co.*, supra.

BY THE ACT OF JUNE 18, 1910, CONGRESS HAS UNDERTAKEN TO OCCUPY THE FIELD OF INTERSTATE COMMERCE BY TELEGRAPH AND ASSUME EXCLUSIVE JURISDICTION AND AUTHORITY IN THE REGULATION THEREOF.

We submit that Congress by its action in the passage of the Act of June 18, 1910, entitled "An Act to amend the Act entitled 'An Act to Regulate Commerce' approv-

ed February fourth, 1887" has taken possession and control of the field of interstate commerce by telegraph. Section 7 of this Act provides:

> Section 7. That Section one of the Act entitled "An Act to regulate commerce" approved February fourth, 1887, as heretofore amended, is hereby now amended so as to read as follows:
>
> Section 1. That the provisions of this Act shall apply to * * telegraph, telephone and cable companies, (whether wire or wireless) engaged in sending messages from one state, territory or district of the United States, to any other state, territory or district of the united States, or to any foreign country, who shall be held and considered to be common carriers within the meaning and purpose of this Act. * * * All charges made for the transmission of messages by telegraph, telephone or cable as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; PROVIDED, That messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." 36 St. at L. 544-545.

The plain effect of this enactment is to exclude the control and regulation of the states and to establish a uniform rule for the government of interstate carriers by telegraph and telephone. The amendment makes telegraph and telephone companies engaged in handling messages between the several states common carriers within the meaning of the Act. It stipulates that the rates shall be just and reasonable. It authorizes the creation of classes such as repeated, unrepeated, etc. No part of the telegraph business affecting the general public has been left untouched. In the use of the words

"repeated" and "unrepeated" Congress but adopts terms which have their own peculiar significance in the telegraphic world, a significance acquired through years of usage by telegraph companies. It is known to every one that the contracts of transmission provide that in the case of unrepeated messages the telegraph companies charge less than for repeated messages. That the contracts provide a certain liability in the one case and a larger liability in the other. In the peculiar significance of the nomenclature of the classes taken from the current language of those engaged in the telegraph business and those dealing with the telegraph companies, we find express approval of the contracts as ordinarily drawn.

The amendatory Act in question was written and enacted in full view of a practice which has been engaged in for half a century by the telegraph companies, and in full view of the case of *Primrose vs. Western Union Telegraph Company*, 154 U. S. 1, 38 L. Ed. 883, which case analyzes the contract of the telegraph companies, discusses its policy and adjudicates its legality.

The passage of the Carmack Amendment presents an analogous situation. That Act was passed at a time when the states were controlling by their own interpretations of the law, the liability of carriers engaged in interstate commerce. This court has held this Act to be evidence of the intention of Congress to take possession of the subject of the liability of carriers under interstate contracts of shipment. We submit that the Act of June 18, 1910, is as broad in its scope as the Carmack Amendment and evinces the purpose of Congress to enter the field and take possession of the subject of the liability of the telegraph company under its contract for interstate transmission of messages. It has been so construed by several courts of last resort.

"It is apparent that Congress has undertaken to occupy the field of interstate commerce by telegraph and assume exclusive jurisdiction and authority in the regulation thereof, and has specifically prescribed the rules which govern business of this

character." *Western Union Telegraph Company vs. Bank of Spencer,* 156 Pac. (Okla.) 1175.

And the Supreme Court of Maine in the case of *Haskell Implement Co. vs. Postal Telegraph-Cable Co.,* 96 Atl. 219 said:

> "By the Act of June 18, 1910, telegraph companies have been made common carriers within the meaning and subject to the provisions of the Interstate Commerce Act. Being so subject as to all questions of classification, regulation and procedure, and especially where, as in this case, the reasonableness of the rules and charges and the limitation of liability are in question, state courts are without jurisdiction; as such cases must be brought in the Federal Court, or be submitted for the determination of the Interstate Commerce Commission as in the case of other common carriers coming within the administrative competency of that Commission."

In *Gardiner vs. Western Union Telegraph Co.,* 230 Fed. 405, the Circuit Court of Appeals for the eighth circuit said:

> "Congress has taken possession of interstate commerce by telegraph and it results that the power of the states to regulate with reference thereto has been superseded."

With this question so decided, application was made to this court for a writ of certiorari. The writ was DENIED by this court on March 19, 1917. *Gardiner vs. Western Union Telegraph Co.,* 243 U. S. 108, 61 L. Ed. 944.

The Supreme Court of Appeals of Virginia in *Western Union Telegraph Company vs. Bilisoly,* 116 Va. 562, 82 S. E. 91, said:

> "By an Act of Congress approved June 18, 1910, telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and

> are subject, so far as applicable, to the same rules, restrictions and penalties that are imposed upon common carriers. This Act has occupied the entire field and taken complete control of the regulation of telegraph companies. * * It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the state statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The Act of Congress has ousted the state of jurisdiction over the subject."

The case of *Western Union Telegraph Co. vs. Banks*, 83 S. E. (Va.) 424, reaffirms the holding in the Bilisoly case. And the Supreme Court of Kansas in the case of *Bailey vs. Western Union Telegraph Co.*, 156 Pac. 716 holds that:

> "Prior to the passage of the Act of Congress in June, 1910, whatever may have been the law governing the right to recover damages on account of the delay in the delivery of telegraphic messages, since the passage of that act the decisions appear almost unanimous that the limitations on the liability of telegraph companies for damages caused by delay in delivering the message are governed by the regulation above set out and that no other recovery may be had."

The Supreme Court of Wisconsin on March 13, 1917, decided the question here presented in the case of *Durre vs. Western Union Telegraph Co.*, 161 N. W. 755, by reaching the conclusion "that there can be no recovery under Section 1778, Subd. 5 Wis. Stat. for mental anguish arising from delay in delivering interstate telegraphic messages." And the Tennessee Court in *Western Union Telegraph Co. vs. Schade*, 192 S. W. decided that "it is not to be doubted that since Congress by the passage of the amendatory act above referred to (Act of June 18, 1910) has entered the field and assumed the regulation of interstate telegraphic communication, the liability of the common carrier for mental suffering is also controlled by the Federal law."

The North Carolina court in the case of *Meadows vs. Postal Telegraph-Cable Co.*, 91 S. E. 1009 states our position very clearly in the following language:

> "Before the passage of the amendment of 1910 there had been no legislation by Congress affecting or conflicting with state statutes and other laws respecting the liability of telegraph companies for negligence in transmitting and delivering interstate messages, and therefore the local rule of law prevailed and was controlling in fixing such liability * * * These decisions are based upon the fact that, at the time they were rendered, no congressional legislation existed on the subject. Such judicial utterances would mean nothing unless they meant that when Congress did act, and undertake to regulate telegraph companies in the matter of the transmission and delivery of interstate messages, the statutes of the states on the subject would be superseded by the action. * * We are of the opinion that the court should have granted the non-suit, as the plaintiff is not entitled to recover by reason of the fact that Congress has taken possession of the entire field of interstate commerce so far as it affects telegraph companies in their interstate business."

See also *Norris vs. Western Union Telegraph Co.*, 93 S. E. 465, and *Bateman vs. Western Union Tele. Co.*, 93 S. E. 467, L. R. A. 1918A p 803.

The Kentucky Court of Appeals in *Western Union Telegraph Company vs. Robert E. Lee*, 192 S. W. 70, holds that "there can be little or no doubt that Congress intended to take control of the whole field covering the regulation of interstate telegrams" while the Supreme Judicial Court of Massachusetts in *Western Union Telegraph Company vs. Foster*, 113 N. E. 192 concedes "that the amendment of June 18, 1910, had the effect of removing from the operation of state control interstate commerce by telegraph and telephone." In *Western Union Telegraph Co. vs. Hawkins*, 73 So. 973, the Supreme Court of Alabama had before it the same question

presented here. In disposing of the contention the court said:

> "The decisive question in this case is whether under the interstate commerce law, as amended by Act of Congress June 18, 1910, c309, 36 Stat. at Large 539, state laws regulating the contract, obligations and liability of common carriers of interstate telegrams have been superseded and annulled by the provisions of the Federal law. * * The effect of the Carmack Amendment of June 29, 1906, was to withdraw from the states the entire subject of the regulation of interstate carriage of freight and passengers, and to vest it exclusively in the Interstate Commerce Commission. Its primary purpose was to secure uniformity in classifications, rates, obligations and liability. *Adams Express Co. vs. Croninger*, 226 U. S. 491, 57 L. Ed. 314. *K. C. S. R. Co. vs. Carl*, 227 U. S. 639, 57 L.Ed. 683. *H. E. & W. T. Ry. Co. vs. U. S.*, 234 U.S. 342, 58 L.Ed. 1341. *So. Ry. Co. vs. Prescott*, 240 U. S. 632, 60 L. Ed. 836. The language of the act as amended by the act of June 18, 1910, leaves no room for doubting that the purpose and effect of the amendment were to place telegraph, telephone and cable companies, as to their interstate business, within the operation of the Commerce Act, equally with interstate carriers of goods and passengers, to the complete exclusion of state laws in regulation thereof."

And the question has been considered by the Interstate Commerce Commission; it was directly presented for decision in Unrepeated Message Case No. 8917, *J. L. Cultra and Myrtle Cultra, partners, trading as The Clay County Produce Company vs. Western Union Telegraph Company*, decided by the Commission on May 17, 1917, 44 I. C. C. 670. We quote the following from the ruling of the Commission in that case:

> "The questions presented for our consideration, as stated by the complainants, are in substance as follows: (a) Whether the Congress, by the Act of

June 18, 1910, amending the Act to regulate commerce, has vested in this Commission such jurisdiction over the rates and practices of telegraph companies as to bring under our control and within our regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages, and (b) whether, if the Commission has such jurisdiction, the present rules of the defendant telegraph company, with respect to these matters, are reasonable and, as the complainants put the inquiry, whether they are consistent with sound public policy."

That was a case in which it was alleged that a mistake in the transmission of a message caused a loss of $1,790.83. It was an unrepeated message of the same class and character as the message involved in the case at bar. After setting out the terms and conditions under which the unrepeated message was accepted by the company, and setting forth the provisions of the act pertaining to telegraph companies the Commission continued:

"Under the Act, as has many times been said, the right to initiate their rates rests with the carriers. As Section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges. But it has not been thought or even suggested that a telegraph or telephone company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The courts have often said that the vital feature of the act to regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of common carriers and to destroy favoritism by such carriers among those requiring their services.

This principle, founded in common right as well as in common justice, runs all through the act and through the supplementary legislation enacted in aid of the enforcement of the act. * * * To secure uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the act to regulate commerce, and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies, unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference.

Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an UNREPEATED MESSAGE, the rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged with a maximum of $50.00. * *

Our conclusion upon the record is that the Congress by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, condi-

tions and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon by the defendant here; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy, but on the contrary, are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

It will be observed that the Interstate Commerce Commission not only held that the Act superseded all state laws on the subject, but also held that the very contract under consideration in this case is not unreasonable or otherwise unlawful. The Interstate Commerce Commission is a creature of the statute brought into being for the express purpose of administering the Interstate Commission Act. The amendment of 1910 is a part of that act. In order to properly administer the law it follows as a matter of course that the Commission must be able to interpret it. And when this Commission, acting within the authority conferred upon it by Congress, and properly performing its duty of administering the law, makes a ruling, such ruling will, in our opinion, be held conclusive. At least that is what we gather from the language of this court in *Louisville & Nashville R. R. Co. vs. United States*, 62 L. Ed. 166, 38 Sup. Ct. Rep. 141.

AUTHORITIES TO THE CONTRARY.

So far as we have been able to discover, only four courts of last resort have decided against our contentions. The courts of Mississippi, Texas, Indiana and Arkansas, have held that state laws regulating the contract obligations and liability of carriers of interstate messages have not been superseded or annulled by the provisions of the

Federal statute, and that cases of this sort must be controlled by the rules and decisions of the state courts rather than the Federal courts. The Mississippi Court disposed of the case at bar on the authority of the case of *Dickerson vs. Western Union Telegraph Company,* 114 Miss. 115, 74 So. 779, Stevens J. specially concurring for the sole reason that, so far as the Mississippi Court is concerned the Dickerson case, unless overruled, controls this case. He dissented in the Dickerson case and in his concurring opinion in the case at bar adds that he is now more strongly convinced than ever of the unsoundness of that decision.

MISSISSIPPI CASE.

In the case of *Dickerson vs. Western Union Tel. Co.,* 114 Miss. 115, 74 So. 779, the Supreme Court of Mississippi, against the great weight of authority on the proposition, and after having itself held to the contrary in *Western Union Telegraph Company vs. Showers,* 73 So. 276, reversed itself and, so far as we are able to discover, for the first time reached the conclusion that the act as amended by the Act of June 18, 1910, has not prescribed complete regulations for interstate transmission of messages by telegraph and that the policy and laws of the state as accepted and enforced by the decisions of the state court control the liability of telegraph companies under their contracts for the interstate transmission of telegrams.

Without citing direct authority or any precedent, the Supreme Court of Mississippi in the Dickerson case rests its decision on the cases of *Western Union Telegraph Co. vs. Brown,* 234 U. S. 542, 58 L. Ed. 1457, and *Western Union Telegraph Company vs. Crovo,* 220 U. S. 364, L. Ed. 498. The Brown case arose long prior to the act of 1910. It was determined upon well settled principles distinct, though not altogether disassociated, from the principles for which we now contend. It had nothing whatever to do with the act in question and the note by the editor of the Law. Edition to the case, cited at length by

the court in support of its views, can have no bearing here because the case has none. The decisions upon which we rely in the instant case do not rest upon the Brown case. In the Dickerson case the court says:

> "We are aware that the courts of several states and some of the Federal Courts have decided in accordance with the contention of the appellee, and that this court in the case of *Western Union Tel. Co. vs. Showers*, 73 So. 276, followed those decisions in holding that the act of Congress has superseded state laws and decisions. In the present case those authorities have been reviewed and discussed in the arguments, and we have carefully examined them and have reached the conclusion that these decisions have misconceived the effect of the act of 1910, and have MISCONSTRUED THE EFFECT AND PURPORT OF THE DECISION OF THE UNITED STATES SUPREME COURT IN *WESTERN UNION TEL. CO. VS. BROWN*, 234 U. S. 542, 58 L. Ed. 1457."

We most respectfully submit that instead of a misconception of the Brown case by the courts of the several states, the Mississippi Court has misconceived the cases which it criticises. A reading of those opinions will convince one conversant with the subject that the decision of the question at stake here cannot rest upon the Brown case.

And so with *Western Union Tele. Co. vs. Crovo.* That case has nothing to do with the case at bar. The cause of action arose long before the amendment of 1910. We do not contend against its doctrine. On the other hand the case expressly holds that the statute of Virginia "IS A VALID EXERCISE OF THE POWER, IN THE ABSENCE OF LEGISLATION BY CONGRESS." We contend that there is no longer an absence of legislation by Congress. The Act of June 18, 1910. is the legislation that was absent in the Crovo case. The Virginia court held in the Crovo case that the penalty was validly imposed because of the absence of legislation by Congress. But the same court in the case of *Western Union Tele.*

Co. vs. Bilisoly, 116 Va. 562, 83 S. E. 91, in considering the same question after the amendment of June 18, 1910, has held that the penalty cannot be imposed BECAUSE LEGISLATION BY CONGRESS IS NO LONGER LACKING.

The vital portion of the decision in the Dickerson case is the statement that:

> "It seems to us that the Act of 1910 is no broader, when applied to telegraph and telephone companies, than the original act to regulate commerce prior to the Carmack Amendment was to the railroads, and the same rules would apply to the telegraph business under the present statute as applied to the railroads under the statute prior to the Carmack Amendment."

Upon the correctness or incorrectness of this statement depends the soundness of the court's opinion. The court uses to support the above the cases of *Penn. R. R. Co. vs. Hughes,* 191 U. S. 477, 48 L. Ed. 268, and *Adams Express Co. vs. Croninger,* 226 U. S. 491, 57 L. Ed. 314.

We think, and we submit, that if there are any two authorities which better support our view in this matter, we have not been able to find them. The Hughes case presents the situation before the Carmack Amendment; the Croninger case presents it after the passage of that act. In the Hughes case the railroad pleaded the contract of shipment wherein it was stipulated that a fixed value should be paid by it for loss or damage. The Pennsylvania court refused to give life to this stipulation. The railroad company contended that the failure of the trial court to limit the value in accordance with the contract was in contravention of the legislation of Congress, referring to the Interstate Commerce Act. The Supreme Court of the United States in adhering to the doctrine that the states might act until Congress acted, said of the scope and purpose of the Interstate Commerce Act as it stood at that time:

> "In refusing to limit recovery to the valuation agreed upon, did the state court deny to the company

a right or privilege secured by the Interstate Commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provisions as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find such provisions therein. The sections of the Interstate Commerce law relied upon by learned counsel for plaintiff in error (24 Stat. at L. 379, 82, Chap. 104 U. S. Comp. Stat. 1901, pp. 3154-3159; 25 Stat. at L. 855 Chap. 382, U. S. Comp. Stat. 1901, p 358) provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules and regulations; for the publication of joint traffic rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the Commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to demand or receive a greater or less compensation for the transportation of property between points as to which a joint tariff is made than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break-bulk, stoppage or interruption by the carrier, unless made in good faith, for some necessary purpose, without intention to evade the act, shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination.

> While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous carriage on interstate lines, WE LOOK IN VAIN FOR ANY REGULATION OF THE MATTER HERE IN CONTROVERSY. THERE IS NO SANCTION OF AGREEMENTS OF THIS CHARACTER LIMITING LIABILITY TO STIPULATED VALUATIONS, AND UNTIL CONGRESS SHALL LEGISLATE UPON IT, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage."

The decision points out that there was no action by Congress upon the subject involved in that case. It sets out in detail the subjects at that time covered by the Commerce Act. And the case further provides THAT UNTIL CONGRESS ACTED, the states might enforce their own regulations upon the subject.

But on June 29, 1906, Congress passed the Carmack Amendment. This amendment provides that:

> Any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws.

The above act does not in express terms sanction a stipulation in the receipt or bill of lading limiting the

value of the property received for carriage. It says nothing as to the contents of the receipt or bill of lading except that it must not exempt the carrier from the liability imposed by that amendment. Yet it has been said that "it embraces the subject of the liability of the carrier under the bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulations with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist." *Adams Express Company vs. Croninger,* 226 U. S. 491, 57 L. Ed. 314.

It will thus be seen that it was held that the states might act until Congress acted. And that in the absence of Congressional action the validity of a carrier's contract of shipment might be determined by the states. Telephone and telegraph companies stood thus before the act of June 18, 1910. Until the passage of this amendment the telegraph business was not touched by the Interstate Commerce Act, and until Congress evinced its purpose to enter the field of commerce the states might act. *Western Union Telegraph Company vs. Pendleton,* 122 U. S. 347, 30 L. Ed. 1187.

In *Western Union Telegraph Company vs. Milling Company,* 218 U. S. 406, 54 L. Ed. 1088, it was held that the state of Michigan might, in the absence of Congressional action, provide as to the liability of a telegraph company for its negligence in the handling of an interstate message. But, as said by the District of Columbia Court of Appeals in *Western Union Telegraph Company vs Dant,* 42 App. D. C. 398, L. R. A. 1915B 685:

> "The cause of action arose in that case prior to the passage of the act of 1910. By this act express

authority is given for the different classification of messages, and the charge of different rates for the different classes is also expressly authorized. Repeated and unrepeated messages were well known to the art and, of course, it must be presumed that Congress intended the words to be given their ordinary meaning. Prior to the enactment of this statute, as we have seen, the court of last resort had ruled that, in the absence of state statutes to the contrary, it was competent for a telegraph company to make such classification of its messages. *Primrose vs. Western Union Telegraph Company,* Supra. CONGRESS, THEREFORE, IN EXPRESS TERMS, HAS SANCTIONED THE PRACTICE THERETOFORE EXISTING."

By this act Congress authorizes the classification of messages into REPEATED, UNREPEATED AND OTHER CLASSES. It also authorizes the charging of different rates for the different classes. It is clearly apparent that the reason Congress permitted rates for the different classes is that each class carries a different liability on the part of the telegraph company. Rates are made with a view to the liability and Congress knew this. Therefore, when Congress authorized the telegraph companies to classify interstate messages into repeated, unrepeated and other classes, and to charge a different rate for such classes, it must be, as stated by the District of Columbia Court of Appeals, that it intended the words to be given their ordinary meaning. Telegraph companies transmit no messages without regard to liability. Each transaction is based upon its own peculiar importance. In the instant case Congress has authorized the plaintiff in error to classify its messages into repeated, unrepeated, etc., and to charge a different rate for each class of service. It expressly authorizes the unrepeated message. A suit arises over an error in the transmission of this message and the Mississippi court holds that the liability of the telegraph company must be controlled by the decisions of this state and not by the decisions of the Federal courts. The

liability in this state under an unrepeated message is the same as under a repeated message, yet a higher rate is charged for one than for the other. The patron in Mississippi who avails himself of the higher class message and pays the higher rate is, therefore, in no better position than the patron who accepts the lower class and pays the lower rate. In effect the payment of the higher rate is useless. Under direct authorization by Congress the telegraph company attempts to distinguish between the higher and the lower classes by fixing a measure of damages. The state court holds that the stipulation is void. Congress says "you may." The state court says, "it is void." We thus have a clash in the exercise of powers in a field where the national government is supreme.

The Mississippi court in the Dickerson case says that the other courts which have passed on the question here presented have misconceived the "effect and purport" of the case of *Adams Express Company vs. Croninger,* Supra. But the court fails to show any misconception by the other courts. There is a total failure to point out where the other courts misconceive it. On the other hand we respectfully submit that the Mississippi Court misconceives it when it says in its opinion:

> "In the case of *Adams Express Company vs. Croninger,* which involved a question as to whether or not Congress had taken over full control of railroad transportation under the Carmack Amendment * * *."

That was not the question in the Croninger case at all. It was never contended in that case that by that Act Congress took over "full control of railroad transportation." A large portion of railroad transportation was taken over under the original act of 1887. The Hughes case supra. shows this. The Carmack Amendment only added to the subjects already taken over, the subject of the liability of the carrier under its interstate bill of lading. It did not purport to take over full control. There are a great many subjects of transportation in interstate commerce not yet taken over. Justice Lurton said:

"It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract."

So, in the instant case we are not contending that by the act of June 18, 1910, Congress undertook by that act alone to cover the entire field of the telegraph business. There are portions of interstate commerce by telegraph not yet withdrawn from the operation of the state laws. But we do submit, and most earnestly urge, that by the Act of 1910 Congress did affirmatively make telegraph companies common carriers and did legislate upon the rates to be charged, the character of message to be used, and in defining the character of message Congress expressly approved and sanctioned an "unrepeated" message, which term has a well settled meaning derived from years of usage and which has been taken from the current language of the day by Congress and set in the act in question. And to emphasize the fact that it understood what it was about, Congress provided in Section 1 of the amendment as follows:

"Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property * * nor shall they apply to the transmission of messages by telephone or telegraph wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

The provisions clearly show that Congress was aware that it was entering the field of interstate commerce in the matter of the transmission of messages. And entering that field the first matters which Congress would likely cover by legislation would be the matter of rates and the matter of liability on the part of the carriers, and the compensation to be paid by the customers.

Finally the Mississippi court in its opinion says:

"Referring to the Act of 1910, set out above, what statute of the United States regulates liabili-

ties, rights and duties between the telegraph company and its patrons?"

We answer that question by saying that the very act to which the court refers, the Act of June 18, 1910.

First, there is the duty to receive messages. This duty is imposed by the act in question. It makes them common carriers. Common carriers are under the duty to serve all; the railroad companies to accept freight and passengers and the telegraph companies to receive messages. The very term itself, "COMMON CARRIER," imports this duty. But Congress has enacted that they are common carriers. The duty to accept, therefore, arises under the Federal law. The State of North Carolina has a statute requiring railroads to accept freight under a penalty. The Southern Railway Company refused to accept a shipment of freight tendered by Etta C. Reid at Charlotte, in the state of North Carolina, destined to Davis, in the state of West Virginia. Reid sued the railroad company for the penalty allowed by this statute. The railway company answered by saying that its duty to receive the freight shipment arose under the Federal law and damages under the statute could not be recovered. The North Carolina Court denied this plea, saying:

> "The statutory enforcement under penalty of the common-law duty to accept freight whenever tendered, is not within the scope or terms of any act of Congress. It is neither an interference with or a burden on interstate Commerce." *Southern Ry. Co. vs. Reid*, 153 N. C. 490, 69 S. E. 18.

But that case was brought to this court and it was said:

> "We are unable to agree with the conclusion. * * In the term 'transportation' we have seen, Congress has included 'all services in connection with the receipt of property transported.' And this certainly imposes the obligation to receive the property as well as to carry it." *Southern Ry. Co. vs. Reid*, 222 U. S. 424, 57 L. Ed. 257.

Thus it will be seen that the duty to accept arises under the Federal law. If the duty to accept is shown, the right of the patron to enforce it necessarily follows, and the company is liable for a breach of this duty. Thus we have a duty of the company, a right of the patron, and liability of the company coming from the Federal law.

Then, there is the duty to transmit the message. We submit that the same reasoning and authorities will support the duty to transmit. The duty to accept is a duty to accept for transmission. It is the duty of a common carrier. If a message is accepted and not transmitted the company will be liable for a failure in this duty. Thus we have the duty of the telegraph company to transmit the message, the right of the patron to have it transmitted, and the liability of the company for a failure to transmit.

There is also the duty to deliver. This is a part of the transmission. The duty to transmit is a duty to transmit and deliver with reasonable speed and accuracy. The company will be liable if it does not.

Then there is the duty to make rates just and reasonable, and any other rates are unlawful. There is the express authority and power to classify messages; to have a class known as unrepeated, one as repeated and other such classes, etc. In effect the contract between the patrons and the telegraph companies respecting transmission of interstate messages has been outlined by Congress. The right is given the patron to appeal from a change of rates, and remedies are afforded against unreasonable regulations. Lastly, there is the right of the patron to estimate his damages in event of loss or delay and contract with the company accordingly, paying for the service the established rate applicable to the class of message desired. In fact, we cannot suggest a duty on the part of the telegraph company to its patrons that is not covered by this act. There is no "twilight zone" left between the company and its patrons. The duties are clear and the rights are clear. We, therefore respectfully submit, that the majority of the Mississippi court

(there was a dissenting opinion, and one other judge not taking part in the decision of the case) fell into error in the Dickerson case.

Since the decision in the Dickerson case the Supreme Court of Texas in the case of *Western Union Telegraph Company vs. Bailey*, 196 S. W. 516, has also held contrary to our contention.

THE TEXAS CASE.

The Texas Court in the Bailey case attempts to distinguish between the Act of June 18, 1910, and the Carmack Amendment. "Even in cases admittedly controlled by the Federal Law where it is held that an interstate carrier of property may by fair and reasonable agreement limit the amount recoverable to an agreed value" says the court, "the agreement is not permitted to include exemption against the negligence of the carrier or its servants. The basis of the holding that such an agreement may be entered into is the advantage given the shipper in obtaining, as the consideration for the agreement, the lower of two or more rates proportionate to the amount of the risk. But the present case rests in no such circumstances. There is nothing in this record to show that any rate lower than the ordinary rate for a message of its class was charged for transmitting the message."

The telegraph company's contract is not an exemption from liability for negligence. "By the regulation in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise." *Primrose vs. Western Union Telegraph Co.*, 154 U. S. 1, 38 L. Ed. 883. The unrepeated message is the lowest class of message. It carries the lowest rate, so, of course, there was nothing in the record to show that any

rate lower than the ordinary rate for a message of its class was charged. There was, however, a higher rate open to the sender; a rate under which he could have been insured against loss. There was the choice between the unrepeated rate and the insured rate. The sender could have availed himself of this higher rate or class by paying an additional sum based on such value equal to one-tenth of one per cent thereof. But the sender chose to accept the lowest rate and tendered for transmission an unrepeated message. There was, as the opinion shows, an offer on the part of the telegraph company to assume liability up to any agreed value for a specified rate, or to send an unrepeated message for the lowest rate at the sender's risk of damage in excess of the amount of the tolls, which constitute an agreed valuation to that amount. The limitation of value and liability to the rate paid for an unrepeated message is as legal and binding as any higher agreed value and amount would be. *Primrose vs. Western Union Telegraph Company*, Supra.

When Congress enacted the amendment of June 10, 1910, it not only provided that rates should be just and reasonable but provided also that the rates might vary in proportion to the liability assumed. That is the sum and substance of the authority to classify messages into repeated, unrepeated and other classifications. The rate charged and the liability assumed are thus given a vital and close connection. One is made to depend upon the other. This is no new principle, for in the Croninger case it was said:

> "That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in a degree measured by the bulk, weight and value of the property carried."

In the case of telegrams the sender is the only one who knows the damage that will be sustained in the event

of loss or delay. Though consequences of an error may be figured from its face in some instances, this is the exception and not the rule. The only thing carried is information. It is not tangible property. It has no market value. As said by the Virginia Court in *Boyce vs. Western Union Telegraph Company*, 89 S. E. 106, "Telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated messages, and to charge different rates for each; in other words to enter into the very contract which was made in the case." Citing *Williams vs. Western Union Telegraph Company*, 203 Fed. 140, *same vs. Dant*, 42 App. D. C. 398, L. R. A. 1915B 685, the court continues: "The Texas Court holds in favor of the contention of the plaintiff. We are, however, of the opinion that the weight of authority and the better reason sustain the conclusion we have reached that the defendant company is entitled to the protection afforded it by the stipulation in question."

In the opinion in the Bailey case the Texas Court says:

> "To sustain the contention of the plaintiff in error as to the force of the stipulation referred to is but to hold that it has all the virtue of a law exempting it from liability for its own negligence except in an insignificant amount, at least until it is declared unreasonable by the Interstate Commerce Commission after complaint duly made."

The stipulation in the telegraph contract is not at all in the shape of a law exempting the company from liability for its own negligence. That theory was exploded and forever put to rest in *Primrose vs. Western Union Telegraph Company*, 154 U. S. 1, 38 L. Ed. 883. It was there expressly held that this very contract was not an attempt to wholly exempt the company from liability for negligence, "but only to require the sender to pay half as much again as the usual rate, in order to hold the company liable for mistakes or delays in transmitting or delivering." The stipulation is merely a limitation of re-

covery to the sender's agreed value. The contract fixes no limitation of the sender's right to place full value on the message. The only requirement is that he pay a rate commensurate with the value of the service performed. It would be little less than absurd to hold that there may be different classes of messages, each class taking a different rate, and yet all classes carrying the same degree of liability. All charges are fixed with reference to the liability of the undertaking. As stated by the Interstate Commerce Commission in the Cultra case, supra:

> "If as a matter of law, the rate charged and collected for an unrepeated message carried with it the same protection to the sender or recipient and imposed upon the company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classifications of repeated and unrepeated, with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained."

"But," says the Texas tribunal, "we do not understand it to be the function of the Interstate Commerce Commission to promulgate rules of law upon this subject. It is the province of Congress to do that; and Congress only, in our opinion, is invested with Federal legislative power over the subject. The Supreme Court of the United States has never, to our knowledge, held by any authoritative expression that the Commission is so empowered, and we do not feel warranted in anticipating such a decision."

When the commerce act was passed, Congress did not establish any court, State or Federal, to administer it. But on the other hand, Congress created a Commission for that purpose and charged it with that duty. The Commission has the administrative powers delegated to it by Congress. It is not an empty or useless power that

may or may not be exercised; it is a power that must be exercised. It is not the function of the Commission to promulgate rules of law on any subject. The subject we are considering is the administration of a law already promulgated by Congress. This law is in the shape of an amendment to the Interstate Commerce Act, which law the Interstate Commerce Commission was created to interpret and administer. Mr. Justice White in the opinion in *Proctor Gamble Co. vs. C. H. & D. R. R. Co.*, 225 U. S. 282, 56 L. Ed. 1091, refers to the Commission as an administrative body endowed with what may be, in some respects, qualified as *quasi* judicial attributes. And in *Swift & Co. vs. H. V. R. Co*, 93 Ohio St. 143, 112 N. E. 212, L. R. A. 1917E 916, it was held that a state court would not review the rulings of the Interstate Commerce Commission for "If the power existed in the courts of the states to question its rulings it would result, most likely, in diverging opinions in matters of interstate commerce, and would be destructive of the uniformity of regulation which the interstate commerce act was designed to secure."

We do not contend that the Interstate Commerce Commission should be permitted to promulgate any law affecting the liability of telegraph or telephone companies. Neither do we admit that the Commission has attempted to do so in this case. But we do contend most earnestly that when the Commission, acting within the authority conferred upon it by Congress, and properly performing its duty of administering the law, makes a ruling such as that made in the Cultra case above quoted, such ruling must be held to be conclusive. *Louisville & Nashville R. Co. vs. United States*, 62 L. Ed. 166.

Again it is said in the opinion in the Bailey case that: "The contract between this legislation and that of Congress relating to the liability of interstate carriers of property very strongly indicates, we think, that the regulation of the liability for negligence of interstate telegraph companies was not in the mind of Congress. That * * this class of common carriers is left without any

regulation of the liability. * * " We again borrow the language of the Interstate Commerce Commission in the Cultra case for our answer:

> "It seems clear, therefore, that the Congress in recognizing by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attached to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed." See also the previous ruling of the Commission in *W. N. White vs. Western Union Telegraph Company*, 33 I. C. C. 500.

The decision in the Texas case is not in harmony with the great weight of authority both of the State and Federal courts. It is not in harmony with the ruling of the Interstate Commerce Commission and it is inconsistent with the previous decisions of this court as pointed out above.

THE INDIANA CASE.

In the case of *Western Union Telegraph Company vs. Boegli*, 115 N. E. 773, there was an action for a penalty imposed by a statute of the state of Indiana "for the failure to deliver a telegram with impartiality and good faith and in the order of time in which it was received." The court speaks of it as imposing a penalty for negligence in the delivery. On the question of the applicability of the Federal law the court holds, in effect, that as the

Interstate Commerce Act does not impose a penalty for negligence in the delivery of a telegram, therefore, Congress has not legislated on the specific subject of the Indiana statute and the latter law is in force and will remain in force until Congress passes a law on that specific subject.

It will be perceived at a glance that the decision has not been at all well considered. We will not discuss it further.

THE ARKANSAS CASE.

In *Des Arc Oil Mill Company vs. Western Union Telegraph Company,* 201 S. W. 723, decided January 28, 1918, the Arkansas Court followed the Texas Court, borrowing from the opinion in the Bailey case, supra., the reasons assigned for its action.

> "The classification of repeated and unrepeated messages and the fixing of different rates for the different classes of messages is quite a different thing from a contract absolving the carrier from liability for its own negligence."

By the use of this language the Arkansas Court makes it manifest that it has lost sight of the fact that "by the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmission." *Primrose vs. Western Union Telegraph Company, supra.* The Primrose case was decided twenty-five years ago. For a quarter of a century the court of last resort in this country has recognized the effect of this contract to be only to require the sender of a message to pay a price commensurate with the service performed in order to hold the telegraph company liable for mistakes in transmission, and not an attempt to exempt the telegraph company from liability for its own negligence. The contract, with a few

inconsequential changes, is as old as the telegraph business itself. The classes of repeated and unrepeated, and the meaning and purpose of each class, was well known and understood when Congress enacted the amendment of 1910. The Primrose decision had been in the books for seventeen years; the terms were well known to the telegraph world and to those dealing with the telegraph business. Would it be crediting the Congress with too much sagacity to say that all this was taken into consideration in the passage of the act? Are we warranted in reaching the conclusion that Congress was well aware of these facts and that when it expressly authorized the classification of messages, using the long established and well known terms in describing the different classes, it knew what it was about? To sustain the contention of the Arkansas Court would amount to nothing less than this, for, says the Interstate Commerce Commission in the Cultra case, supra: "If, as a matter of law, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the company the same liability and degree of care as the rate for a repeated message, then the express authority granted by the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that has for years been well understood and maintained."

But the Arkansas Court says that "If it had been intended to confer power upon the Interstate Commerce Commission to change the law in that respect by the mere approval of *classification of rates*, doubtless the framers of the statute would have used different language." We answer this by saying that it was not the purpose of the act to "CLASSIFY RATES." The act authorizes the classification of "MESSAGES." Messages may be classified into repeated, unrepeated, etc. and each class may take a different rate. This is a classification of the serv-

ice, not a classification of the rates. Each class of service takes a different rate. The patron has his option of selecting the class. They are all open to him. It is our contention merely that he cannot select one class and pay the rate for that class and then claim the rights and benefits under a different class. Congress had no intention whatever of conferring upon the Interstate Commerce Commission the power to change the law in that regard or in any other respect. There was no necessity for any change of the law. Congress, by the act in question, merely sanctions regulations long established and understood. It is quite true that the words "liability" and "negligence" are not expressly mentioned in the act. This was not necessary. Congress was formulating a provision regulating the liability of telegraph companies, and in doing so used the different terms, repeated, unrepeated, etc. well knowing the different regulations of liability which distinguished the one class from the other. Every patron of the telegraph has knowledge of them, for they appear on every telegraph blank. Every legislature and court in the land knows of them; and since the advent of the telegraph business the courts have been dealing with them. Then why impute to the Congress an ignorance of them?

We submit that no well reasoned authorities can be marshaled in support of the position of the Arkansas Court. The Arkansas Court is itself divided on the matter. There was a strong dissenting opinion written which was concurred in by two of the judges. The dissenting opinion in this case as in the Mississippi case announces the correct principles of law which govern the case. The majority opinion does not.

ACTION IN TORT OR ACTION EX CONTRACTU

It may be said that the action in the instant case is one sounding in tort and is not based upon the contract of transmission, and as a consequence the stipulations of the contract are not available to the plaintiff in error. This may as well be said of the cases cited herein as to the

liability of railroads on their bills of lading. The case of *Primrose vs. Western Union Telegraph Company,* supra. was an action sounding in tort but this court gave effect to the stipulations.

The Supreme Court of Oklahoma in the case of *Western Union Telegraph Company vs. Bank of Spencer,* 156 Pac. 1175 was confronted with this argument and thus answered it:

> It is said, however, that the action is one sounding in tort and is not based upon the contract, and therefore the Act of Congress in question does not apply, and the decisions cited are not controlling. This, however, does not make any difference."

The power to classify messages is directly given by the Federal law, and in reaching the exact meaning of this law recourse must be had to the significance of the classes authorized. The vital differences are in the rates and the liability of the company in event of its failure to comply with the duties assumed. To hold that a plaintiff by denominating his action one in tort rather than *ex contractu* could escape the law would be a clear nullification of the powers given by the act and would thwart the clear intent of Congress.

NO REQUIREMENT AS TO THE PUBLICATION, FILING AND POSTING OF THE SCHEDULES OF CHARGES, ETC.

It may be urged in this court that it does not appear that the tariffs have been filed with and approved by the Interstate Commerce Commission. It will be noted, however, that Section 6 of the interstate commerce act requiring the filing of schedules is applicable only to carriers of persons and property and in no way applies to telegraph companies. Section 6 was not amended and stands as originally passed, applicable only to carriers of persons and property.

The Interstate Commerce Commission in its report to Congress on December 20, 1911, in speaking of the act as amended on June 18, 1910, said:

> "There appears to be no requirement for publication, filing and posting of the schedules of charges for the transmission of telegraph, telephone or cable messages between different places on the same route, or from place to place on one route or line to a place on another route or line."

The Commission thereupon recommended that the act be amended so as to require the publication, posting and filing of such rates. In *White vs. Western Union Telegraph Company* where an action was brought to have a cable rate reduced the Interstate Commerce Commission held that telegraph companies had the right to initiate the rates and classifications and that they are prima facie reasonable. *White vs. Western Union Tel. Co.* 33 I. C. C. Rep. 500. See also *C. N. O. & T. P. R. R. Co. vs. Rankin,* 241 U. S. 319, 36 Sup. Ct. Rep. 555, 60 L. Ed. 1022.

NO FORMAL PLEADINGS NECESSARY IN THIS CASE.

The transcript herein does not show any pleadings. The question argued here, however, was raised in such manner as to get the consideration of the Supreme Court of Mississippi. In fact the record affirmatively shows that this was the only question considered. The suit originated in the court of a justice of the peace. In cases of this sort in Mississippi no pleadings are filed. At least it is not necessary to file any written pleadings. In cases wherein the amount involved, exclusive of interest and costs, amounts to less than $200.00 dollars, exclusive jurisdiction exists in the court of a justice of the peace. In such courts "everything is conducted *ore tenus.*" *Roberts vs. Weiler,* 52 Miss. 299. From the opinion of the Mississippi Supreme Court it will be seen that this question as to the applicability of the act of June 18, 1910, was the only question considered. The opinion is set out at length at page 21 of the transcript. The Court referred to the case of *Dickerson vs. Western Union Tel. Co.,* 114 Miss. 115 in which case, as we have already seen,

the question is considered at length. It was recognized by the court and by counsel that the defenses would not be good if the case was to be controlled by the decisions of the Supreme Court of Mississippi.

It was not necessary to file written pleadings even after the appeal to the Circuit Court. Section 86 of the Mississippi Code of 1906 provides:

> 86—Trial of cases on appeal.—On appeal from a justice of the peace to the circuit court, the case shall be tried anew, in a summary way, without pleadings in writing, at the first term, unless cause be shown for a continuance.

CONCLUSION.

The opinions of the Mississippi, Texas, Indiana and Arkansas courts above referred to—and which are the only authorities against our contention we have been able to find—are in conflict with the wording and purpose of the amendment. They are in conflict with the rulings of the Interstate Commerce Commission, and with the long line of authorities, State and Federal, cited herein. We have shown that the stipulation in the contract of transmission is not an attempt to exempt the company from liability for its own negligence. The unrepeated message is sent at the sender's risk but if he desires to have his message valued and sent at the risk of the telegraph company the way is open for him to do so. He does not have to send an unrepeated message. He is not forced to send his message at his own risk. If he sends it at his own risk he saves money because the rate is considerably cheaper. There is a difference in the rates charged for the two classes of service. There is an unrepeated rate and a repeated rate, and the specially valued rate. If the cheap rate for the unrepeated message is accepted, it must follow that the limitations applying to that class of service are also accepted. Different rates are maintained and charged. It would be nothing short of discrimination to charge a different rate for the two classes of service without distinguishing between them. To charge one

patron a very low rate and another a very high rate for like messages between the same points filed at the same time would be unlawful. Yet, we submit, this is exactly what the doctrine announced by the adverse decisions amounts to. They say we have two or more different classes of messages and that we can charge different rates for each class, but we must give the same type of service in each instance. We must not attempt to distinguish between the classes. The patron who sends his message at the lowest rate is entitled to the same degree of protection against mistakes and delays as the patron who pays as much again or more for his service. We may have a class of messages known as unrepeated messages which are accepted at the sender's risk for which a very cheap rate is charged, and another class accepted at the company's risk for which a much higher rate is charged. But when there is a mistake or delay, these courts say that we owe just as much to the patron who sent at his own risk as we do to the one who paid the higher rate and sent at our risk. Will anyone advance one single excuse for the existence of the two classes, if such is the case? As to this the opinions mentioned are as silent as the tomb. They make a distinction without a difference. They say that because we offer our patrons a very cheap rate at which they can, if they so desire, send messages at their own risk, we are attempting to exempt ourselves from liability for negligence. And this in spite of the fact that we offer to send any or all messages at our own risk, according our patrons the privilege of naming the value of each message sent.

The purpose of the contract is not to exempt the company from liability for negligence, but to require the patron to select the class of service desired and then to pay according to the service actually performed. But whether the contract is an attempt to exempt the telegraph company from liability for its own negligence or not is a matter with which the state courts have no legitimate concern. Congress has acted and the wisdom or unwisdom of its action is not subject to question by the state courts. The Congress has confided this matter of

interstate commerce by telegraph to the jurisdiction of the Interstate Commerce Commission. This very contract has been considered by the Commission and its conclusion is that it is not unreasonable or otherwise unlawful.

We respectfully submit that the judgment of the Supreme Court of Mississippi should be reversed.

ELLIS B. COOPER,

J. T. BROWN,

J. N. FLOWERS,
Attorneys for Petitioner.

No. [redacted]91

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1919.

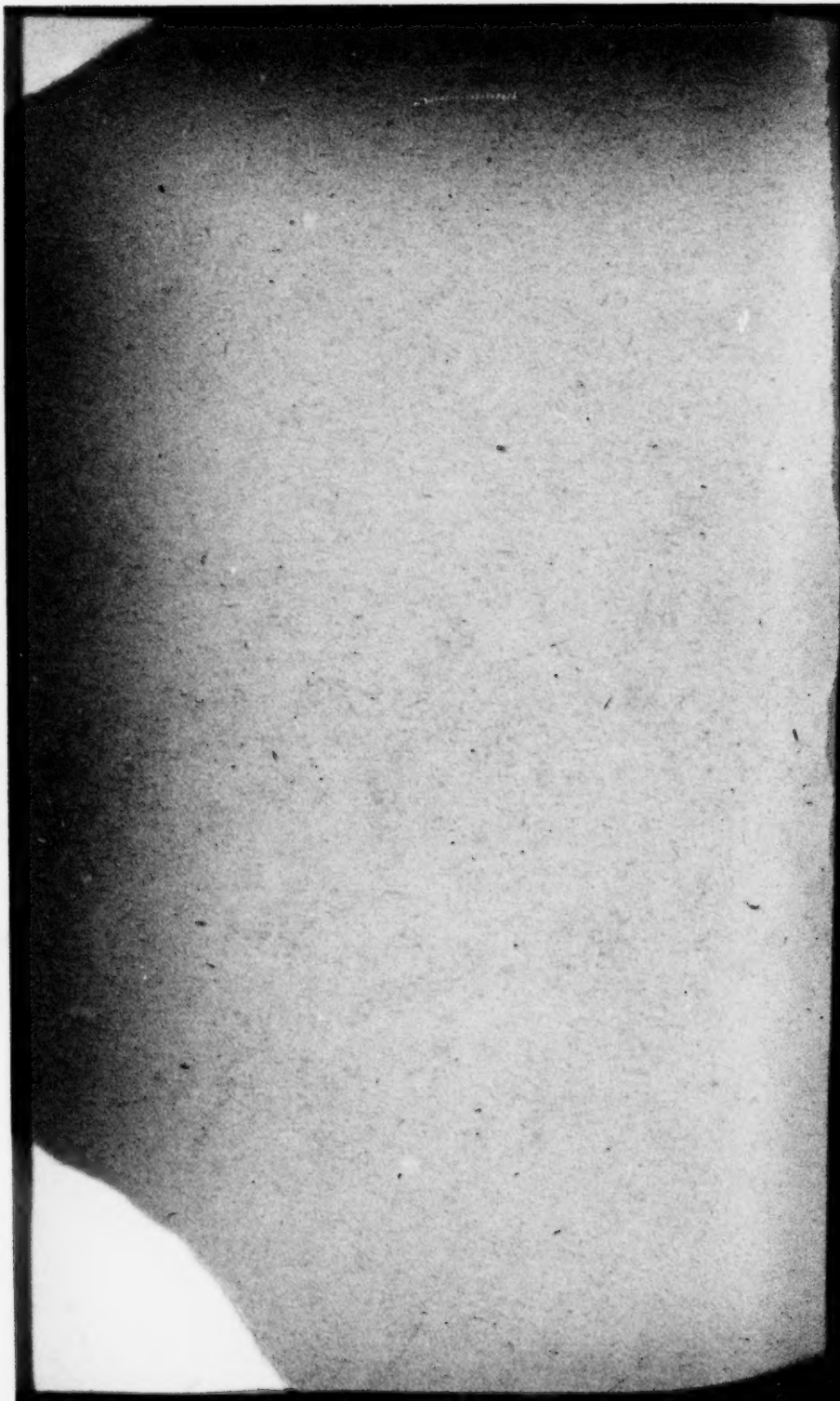
POSTAL TELEGRAPH-CABLE COMPANY,
Petitioner.

versus

WARREN-GODWIN LUMBER COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

WILLIAM D. ANDERSON,
Attorney for Respondent.



No. 420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

POSTAL TELEGRAPH-CABLE COMPANY,

Petitioner,

versus

WARREN-GODWIN LUMBER COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

SUBJECT INDEX.

	Page
Statement	3
Brief of the argument	4
Act of June 18th, 1910, Congress did not occupy entire field of commerce by telegraph	4
Specific action by Congress was necessary in order to accomplish this purpose	4-5
Act of June 18th, 1910	6
Carmack Amendment	6
Comparison of Carmack Amendment and Act of June 18th, 1910	7-10
Authorities for Respondent	4, 5, 7

CASES CITED:

So. Ry. Co. vs. Reid, 222 U. S. 424, 436, 56 L. Ed. 257.	4
Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. 314	4
Dickerson vs. Western Union Tel. Co., 114 M. 115, 74 So. 779	4
Western Union Tel. Co. vs. Bailey, 196 S. W. (Tex.) 516	4
Western Union Tel. Co. vs. Boegli, 115 N. E. (Ind.), 773	4
Des Arc Oil Mill Co. vs. Western Union Tel. Co., 201 S. W. (Ark.), 273	4
Pittsburg Ry. Co. vs. State, 172 Ind., 147, 87 N. E., 1034	5
Pittsburg Ry. Co. vs. State, 223 U. S., 713, 56 L. Ed. 626	5
Penn. R. R. vs. Hughes, 191 U. S. 477, 48 L. Ed. 286	7

STATEMENT.

Respondent, Warren-Godwin Lumber Company, telegraphed from their office at Jackson, Mississippi, D. J. Peterson Lumber Company, Toledo, Ohio, offering three cars of lumber at "twenty-two dollars." An error was made in transmission. When the telegram reached D. J. Peterson Lumber Company it read "twenty dollars" instead of "twenty-two dollars" as sent. On receipt of the message D. J. Peterson Lumber Company wired acceptance. The amount lost by respondent as the result of the error was sued for and judgment recovered against petitioner. On appeal to the Supreme Court of Mississippi the judgment was affirmed. The telegram by respondent contains the usual unrepeated message stipulation. The telegram in question was an unrepeated message. The stipulation referred to limited the amount of recovery for error in an unrepeated message to fifty times the sum received for sending the same. Under the Common Law as declared by the Supreme Court of Mississippi this stipulation is invalid. Under the Common Law as declared by the Supreme Court of the United States it is valid. Therefore, the question is which law applies. If the Common Law as declared by the State applies, the case must be affirmed; while if the Common Law as declared by the Federal Supreme Court applies, the case must be reversed.

A further statement of this case is unnecessary because the brief of counsel for petitioner contains a correct statement, which is adopted for the respondent.

BRIEF OF THE ARGUMENT.

Until specific action by Congress regulating the liability of telegraph companies to their patrons in respect to interstate commerce, the laws of the States are applicable.

So. Ry. Co. vs. Reid, 222 *U. S.*, 424, 436; 56 *L. Ed.* 257.

Adams Express Co. vs. Croninger, 226 *U. S.* 491, 57 *L. Ed.*, 314.

By the Act of June 18th, 1910, Congress did not undertake to occupy the entire field of interstate commerce by telegraph and assume exclusive jurisdiction and authority in the regulation thereof.

Dickerson vs. Western Union Tel. Co., 114 *M.* 115; 74 *So.* 779.

Western Union Tel. Co. vs. Bailey, 196 *S. W.* (*Tex.*) 516.

Western Union Tel. Co. vs. Boegli, 115 *N. E.* (*Ind.*), 773.

Des Arc Oil Mill Co. vs. Western Union Tel. Co., 201 *S. W.* (*Ark.*), 273.

"The mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not in the absence of action by it, change the rule that Congress by non-action leaves power in the States over merely incidental matters. In other words * * * * the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. * * * * Until specific action by Congress or the Commission, the control

of the State over these incidental matters remains undisturbed."

So. Ry. Co. vs. Reid, 222 *U. S.* 424, 56 *L. Ed.* 257.

In the case of *Pittsburg Ry. Co. vs. State*, 172 *Ind*, 147, 87, *N. E.*, 1034, the Supreme Court of Indiana upheld the constitutionality of what is commonly known as the "Full Crew Act" of that State. Among other things the Supreme Court of Indiana said in that case:

> "It may be permitted to stand until Congress sees fit to enter the field and actually legislate upon the precise subject matter, in which event the statute in question would have to yield."

The opinion of the Supreme Court of Indiana in that case was adopted by the Supreme Court of the United States in its general order of affirmance of the case, which will be found reported in 223 *U. S.* 713, 56 *L. Ed.*, 626.

The contention on behalf of respondent is that until legislation by Congress on the specific subject of the duties and obligations of telegraph companies to those dealing with them with respect to interstate messages, the power exists in the States to regulate such duties and obligations.

By the Act of June 18th, 1910, Congress has not undertaken to occupy the entire field of interstate commerce by telegraph, and did not by that Act assume exclusive jurisdiction and authority in the regulation thereof.

It is contended on behalf of petitioner that the Act of June 18th, 1910, is as broad in its provisions as the Carmack Amendment with respect to interstate commerce by railroads. For convenience we here set out the two statutes

in question. The applicable part of the Act of June 18th, 1910 is in this language:

> "All charges made for the transmission of messages by telegraph, telephone or cable as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; **provided,** That messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." 36 *St. at L.* 544-545.

The Act of June 29th, 1906, known as the "Carmack Amendment," provides:

> "Any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws."

In the judgment of counsel for respondent no other argument and brief is necessary on behalf of the respondent than will be found in the opinion of Justice Ethridge of the Supreme Court of Mississippi in the case of *Dickerson vs.*

Western Union Telegraph Company, 114 *M.*, 115, 74 *So.* 779.

The Courts of Texas, Arkansas and Indiana are alligned with the Supreme Court of Mississippi on this question.

Western Union Tel. Co. vs. Bailey, 196 *S. W. (Tex.)*, 516.

Western Union Tel. Co. vs. Boegli, 115 *N. E. (Ind.)*, 773.

Des Arc Oil Mill Co. vs. Western Union Tel. Co., 201 *S. W. (Ark.)*, 273.

Since those decisions were made the Supreme Courts of those States in subsequent cases have repeatedly reaffirmed the principals announced in the original cases.

It is true that the Supreme Courts of Kansas, Oklahoma, Virginia, Wisconsin, Maine, North Carolina and Vermont have taken the contrary view, as have some of the Lower Federal Courts. Counsel for respondent contends, however, that the logic and reasoning of those cases are unsound.

A comparison of the language of the Act of June 18th, 1910, with the Carmack Amendment and the Interstate Commerce Act as it stood before the Carmack Amendment in connection with the decisions of the Supreme Court of the United States construing the Interstate Commerce Act before the Carmack Amendment, clearly settles the proposition that by the Act of June 18th, 1910, Congress did not undertake to occupy the entire field of interstate commerce by telegraph.

In the case of *Penn. R. R. vs. Hughes*, 191 *U. S.* 477, 48 *L. Ed.* 268, the Supreme Court in its opinion set out

the substantial provisions of the Interstate Commerce Act as it stood before the Carmack Amendment so far as they related to the power assumed by Congress, using this language:

> "The Act provides equal facilities to shippers; for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates; for joint ratiff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the Commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different, than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the Act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination."

The Hughes case involved the shipment of a horse in interstate commerce which was injured during shipment. The bill of lading contained a stipulation that there should be no liability for injury beyond the agreed value of the horse, upon which valuation the freight rate was based. Under the laws of the state this stipulation was invalid. Under the Common Law as declared by the Supreme Court

of the United States the stipulation was valid. The question was which law applied. It was contended on behalf of the railroad that Congress by the Interstate Commerce Act as it then stood had taken over the whole subject of interstate commerce, and all obligations and liabilities growing out of the same. Among other things the Supreme Court of the United States said:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character, limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?
>
> It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

Counsel for Respondent contends that the Interstate Commerce Act as it stood before the Carmack Amendment was broader than the Act of June 18th, 1910. The Hughes case by analogy is conclusive of the question here involved. By the plain terms the Act of June 18th, 1910, Congress only undertook to occupy the field of the regulation of the **rates and charges** of telegraph and telephone companies engaged in interstate commerce. In its first clause it provides alone that such charges shall be just and reasonable. In its second clause it provides alone

that unjust and unreasonable charges are prohibited and declared unlawful. In its third clause it provides that messages "may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, **and different rates may be charged for the different classes of messages.**"

The Carmack Amendment in its first clause provides that a receipt or bill of lading shall be issued for interstate shipments and the railroad company shall be liable to the holder for any loss or damage to the property caused by the carrier; and in its second clause it provides against any contract exempting the carrier from liability. It is very plain that by the Carmack Amendment Congress legislated upon the specific subject of the liability of interstate carriers for property shipped in interstate commerce. There was no room to doubt from the language of this statute that all state authority on this question was intended to be superseded.

Where is there any provision in the Act of June 18th, 1910, by which Congress either in direct words or by inference provided for the recovery of damages for injuries to persons dealing with telegraph companies with respect to interstate messages? The sole idea in this statute is to regulate rates and charges. No other subject is treated of. There is no reference to any other subject. It is argued that the power given to telegraph companies to classify their messages and charge different rates for different classes resulted in the taking over of the whole subject by Congress of the duties and obligations between patrons of telegraph companies in respect to interstate commerce. Opposing Counsel however must concede that no such authority is directly and specifically

assumed by Congress; and must admit that to get any such power out of the statute it must be by process of inference and reasoning.

Counsel for Respondent contends that the judgment of the Supreme Court of Mississippi in this case ought to be affirmed.

WILLIAM D. ANDERSON,
Attorney for Respondent.

William D. Anderson
Atty. for Respd

POSTAL TELEGRAPH-CABLE COMPANY *v.* WARREN-GODWIN LUMBER COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 91. Argued November 17, 1919.—Decided December 8, 1919.

Under the Act of June 18, 1910, c. 309, 36 Stat. 539, 545, a telegraph company providing one rate for unrepeated interstate messages and another, higher rate for those repeated, may stipulate for a reasonable limitation of its responsibility when the lower rate is paid; and the validity of such contracts is not determinable by state laws. P. 30.

116 Mississippi, 660, reversed.

THE case is stated in the opinion.

Mr. Ellis B. Cooper, with whom *Mr. J. T. Brown* and *Mr. J. N. Flowers* were on the brief, for petitioner.

Mr. William D. Anderson, for respondent, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from

liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In *Western Union Telegraph Co.* v. *Showers*, 112 Mississippi, 411, the Supreme Court of that State was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeated message essentially like the contract which was considered and upheld in the *Primrose Case*. The court decided that as the Act of Congress of June 18, 1910, c. 309, 36 Stat. 539, 545, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress has taken possession of the field and thus excluded state legislation and hence such a contract was valid and enforcible in accordance with the rule laid down in the *Primrose Case*. In holding this, however, the court pointed out that but for the act of Congress a different rule would apply, as under the state law such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In *Dickerson* v. *Western Union Telegraph Co.*, 114 Mississippi, 115, the validity of a like contract by a telegraph company for the sending of an unrepeated message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the *Showers Case*, as to the operation of the Act of Congress of 1910, was erroneous. Coming therefore to reconsider that subject, it was held that the Act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business and the contracts made by them as to such subject, and hence the

Showers Case, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us, involving the extent of the liability of the Telegraph Company for an unrepeated interstate message governed by a contract like those considered in the previous cases, was decided by a state circuit court after the decision in the *Showers Case* and before the overruling of that case by the *Dickerson Case*. Presumably therefore the court, because of the *Showers* decision, upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the *Dickerson Case*. In view of that situation the court below in disposing of the case expressly declared that the only issue which was open was the correctness of the ruling in the *Dickerson Case*, limiting the operation and effect of the Act of Congress of June 18, 1910. Disposing of that issue, the ruling in the *Dickerson Case* was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law and to be therefore void. That subject presents then the only federal question, and indeed the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the *Dickerson Case* as to the correctness of its ruling in the *Showers Case* (*Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542), but content

ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the Act of Congress of 1910 and why therefore its judgment was erroneous.

In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the *Primrose Case*, the right to contract on such subject was embraced within the grant of the primary rate-making power.

In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal

control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission, (*Clay County Produce Co.* v. *Western Union Telegraph Co.*, 44 I. C. C. 670,) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardner* v. *Western Union Telegraph Co.*, 231 Fed. Rep. 405); and by the numerous and conclusive opinions of state courts of last resort which in considering the Act of 1910 from various points of view reached the conclusion that that act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action. *Western Union Tel. Co.* v. *Bank of Spencer*, 53 Oklahoma, 398; *Haskell Implement Co.* v. *Postal Tel.-Cable Co.*, 114 Maine, 277; *Western Union Tel. Co.* v. *Bilisoly*, 116 Virginia, 562; *Bailey* v. *Western Union Tel. Co.*, 97 Kansas, 619; *Durre* v. *Western Union Tel. Co.*, 165 Wisconsin, 190; *Western Union Tel. Co.* v. *Schade*, 137 Tennessee, 214; *Meadows* v. *Postal Tel. & Cable Co.*, 173 N. Car. 240; *Norris* v. *Western Union Tel. Co.*, 174 N. Car. 92; *Bateman* v. *Western Union Tel. Co.*, 174 N. Car. 97; *Western Union Tel. Co.* v. *Lee*, 174

Kentucky, 210; *Western Union Tel. Co.* v. *Foster*, 224 Massachusetts, 365; *Western Union Tel. Co.* v. *Hawkins*, 14 Ala. App. 295.

It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred.

It follows that the judgment below was erroneous and it must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.